



## **Ep. 34: Colleges and Universities, Class Actions, and COVID-19**

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**Jose Garriga:**

Hello, and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

One of the many challenges facing private and public enterprises as a result of the economic impact of the coronavirus pandemic is the threat of litigation. And one type of litigation that has made headlines involves colleges and universities being sued by their students in class actions. Why? For refunds of tuition and fees paid for that portion of the academic year that their schools moved online as a result of contagion concerns.

In this episode, Akin Gump litigation partner Hyongsoon Kim and counsel Molly Whitman will be discussing the nature of litigation challenges that higher academic institutions are facing, as well as outlining some litigation defenses to consider.

Welcome to the podcast.

Hyongsoon, Molly, thank you both for appearing on the show today. This is a very timely topic, so let's just dive right in.

To set the stage for listeners, could you talk a bit about what sorts of classes have comprised the plaintiffs in suits to date and what it is that they're alleging?

**Molly Whitman:**

Sure, and thanks, Jose, for having us on the podcast today. I'll start by saying that we know the decision to close school campuses and move classes online started happening right around spring break in mid-March. And by the end of March, just a couple of weeks later, the class actions started rolling in, and they haven't stopped. So, we saw over 100 class actions filed between April and May against universities across the country, and we continue to see one to even five new filings a day. The bottom line is that we've been able to compile a lot of data about these cases, and we're starting to see certain trends emerge. I think I'll take the two parts of your question in reverse order, if that's okay. So, first, what are the major allegations in these cases? And you alluded to this a bit in your introduction.

The plaintiffs are broadly claiming that they're being deprived some part of the educational experience and/or services that were available to them on campus. They're demanding pro-rated refunds for a portion of the tuition and/or fees that were paid for the spring 2020 semester. We haven't seen any of the complaints really specifying an exact dollar amount that the plaintiffs are seeking to be refunded, but we can assume for the purposes of this discussion that the plaintiffs will most likely be seeking about 25 percent of a year's tuition and/or fee payments based on the mid-March move to online classes for most schools. The allegations supporting these claims focus, in large part, on a few things.

So, first, what are the school's representations about their facilities, about the academic and social benefits of living on campus? What kinds of clubs or sports or other extracurricular activities do they offer that students have been unable to access since coronavirus shut schools down, essentially, shut the facilities down? And they're also looking at the allegations that online classes are not equivalent to in-person classes in terms of, perhaps, the method and quality of instruction. The plaintiffs are also generally alleging that it's less costly for the schools to provide online classes and that, therefore, schools are allegedly unjustly enriched by retaining the funds that were paid for the beginning of the semester. And I'll pause here to say that I'm not saying that it's, in fact, less costly for schools to provide online classes. I can think of a number of things that may factor into that analysis such as overhead with professors' salaries, additional software or hardware needs that would come up with having online courses, new or additional IT services, potential existing costs to maintain facilities for when in-person classes eventually do resume.

But these are the allegations that we're frequently seeing in these complaints. And then back to the first part of your question, which was what sorts of classes are we seeing being alleged? We're seeing these being alleged in generally two camps. The minority, the class members are members of the student body themselves. The vast majority of classes, however, are pled as those who paid tuition and/or fees on behalf of those enrolled. And I think that makes sense logically when you think about it because students themselves are often not the payers of their own tuition. And by alleging the class members only to be student body members, they may be missing a number of class members that could have been included in their purported class.

**Jose Garriga:** Thank you. So, looking then, more generally, at the various suits that have been filed, are there commonalities or, perhaps, differences that these complaints share? And let me stay with you, Molly, for this.

**Molly Whitman:** So, there are definitely a lot of commonalities, as I mentioned just now. The allegations are generally the same: that the students are not receiving some part of the benefits of their bargain with their school. That's at the heart of these complaints. And another commonality is the principal cause of action, which is breach of contract. Almost inevitably, all of these complaints are alleging in some form or fashion that the universities breached their contract with students to provide the instruction and/or other services. Most, if not all/ of the complaints also include unjust enrichment claims that tend to go hand in hand with the breach of contract claim. And this is because most complaints alleged that there is some manner of contractual right to an in-person education.

But if the plaintiff ultimately can't prove the school made specific promises to provide a particular learning environment or to apply funds to specific services, for example, the breach of contract claim might be dismissed. And, so, the unjust enrichment claims are

tacked on and potentially other equitable claims in plaintiff's attempts to backstop their complaints in the case that the breach of contract claims are thrown out. Another commonality would be the relief requested, I think. Most of the complaints are requesting some form of injunctive relief, asking the courts to enjoin the universities from retaining the funds that are at issue. And whether or not the plaintiffs also seek compensatory or punitive damages depends on whether the defendant school is a public or private institution.

And we've looked a lot at this issue because, of course, there are many public and many private institutions across the country, and under the 11th Amendment of the U.S. Constitution, public universities are considered arms of the state that are protected by sovereign immunity from suits for damages in federal court, and many state constitutions have similar protection. So, this means that public universities may have an additional defense that, unfortunately, private colleges don't have. The complaints are more likely, therefore, to request compensatory and, possibly, punitive damages from private colleges. Some plaintiffs have alleged consumer protection claims such as under California's unfair competition laws, and that's where the punitive damages hook is coming in.

I'll also spend a little bit of time talking about the differences because there are a lot. So, a few of the main differences in these cases that can be readily identified are that difference between public and private I just mentioned. When we compiled our numbers that we've been looking at in these cases around the end of May, just a couple of weeks ago, we saw that about a third of the cases were brought against public universities or public university systems, while two thirds of the cases were against private schools. However, we're also seeing that it's more likely, at least for now, and we're only less than 90 days into this coronavirus situation, we're seeing that, for a public university system, it's more likely that that system will have multiple cases filed against it by different plaintiff firms, representing different plaintiffs, vying to be the class representative for these potentially very large classes.

Just as an example, the California State University system has over 480,000 students enrolled. In fact, it's the largest state university system in the country. Plaintiff's counsel and their clients have a lot of interest in being the named class counsel and class representatives for a putative class of this size. But we've also seen cases against schools of all sorts of various sizes from small liberal arts colleges to massive state systems. There's really not a notable trend that I can point to in terms of the size of the school being sued in these cases.

One other difference is in looking at the venue and the forum of the case and where the plaintiff's counsel has chosen to file. So, first with the venue, or the geographical location where the cases are brought, plaintiffs are taking different strategies, either filing suit in the state where the school is physically located or filing in the state where the plaintiff lives, which is often different from the location of the school. That naturally coincides with the fact that schools usually have students attending from all over the country, and if there are payors who are affiliated with the students, they're also likely to be located all over the country.

As a whole, I would say that it appears the greatest number of cases are being filed in states on the coast, and especially in California, New York and New Jersey. This isn't very surprising given the large number of the higher education institutions in these states.

The last point I think I can make about these differences is that a very large percentage of these cases have been filed in federal court, about 85 percent, as opposed to state court. The state court complaints are more likely to feature a named plaintiff who's also a resident of the state where the school is located, likely in an attempt to avoid diversity jurisdiction. For that reason, the putative class may also be restricted to only residents of the state.

**Jose Garriga:**

Thank you. Molly, you mentioned the plaintiff's firms, and that's a topic... We've discussed class actions in other episodes of this show, both regarding, for example, consumer class actions in the retail space or class actions related to data privacy and cybersecurity. This is the first time, though, I've heard of the higher education industry being the target of such a widespread rash of class actions. Hyongsoon, if you would, is there a roadmap or a playbook, so to speak, for what to expect in these cases?

**Hyongsoon Kim:**

Sure, and very glad to be joining you both for this. I do think there is, and although this is, indeed, the first time we've seen this kind of widespread class actions brought against universities, we've seen this general playbook before, and, indeed, we're seeing it now in the context of class actions being brought against other industries or arising out of similar circumstances. These cases unquestionably are being driven by the plaintiff's bar. The cases against the universities are part of a wider set of cases that have been and are continuing to be filed by the plaintiff's bar, targeting industries like airlines and theme parks and gyms. A lot of these cases being filed share certain themes, including this allegation that some class of consumers paid for certain services that now are either not being provided or allegedly are being provided in some substandard way.

What we're also seeing is that, in the rush of the plaintiff's bar to file these cases, the lawyers often ignore key individual distinctions: distinctions and issues specific to the particular industry or entity, distinctions amongst the members of the putative class, and so on. That's because a lot of these cases were filed quickly by plaintiff's counsel trying to get their foot in the door. And, as a result, you will see complaints that are cookie cutter, that are copied off of complaints that were filed against another university. I think we've seen a couple of instances where the name of the university from which the complaint was copied, a different university, is still in the complaint that's filed against yet a different university. So, you do have this rush to file.

And, although it may be a little hard for us to personally feel this way, it hasn't been that long since the pandemic began, in legal terms. Maybe a little hard to feel that way because we've all been dealing with this situation: Many of us have been working at home, and our jobs and our companies have been impacted for the past few months. So, it may feel like it's lasted for a long time, but a few months is not that long in terms of litigation history, and, so, this is a highly fluid situation. It hasn't been that long since universities formulated what they were going to do and came up with their policies for how to deal with the pandemic. And universities are still trying to figure out what they're going to do in the fall.

So, as some of these issues work their way out, I think we will see, both courts and counsel, start to weed out many of the complaints that are working their way through the system. Plaintiffs, I think, may come to realize that they're going to have difficulty, in particular, not just on the merits, but also certifying a class in these cases, for reasons we can discuss a little later. And if the plaintiffs can't certify a class, then the plaintiff's counsel loses the financial incentive to pursue these cases.

So, as the months progress, as courts begin to decide certain fundamental issues like the nature of the contract terms, to the extent any exist between universities and students, these legal issues and disputes will come into sharper focus, and we will better understand how universities' financial conditions might also impact these cases going forward. We know that the pandemic has significantly and adversely affected universities financially. We know that there are good reasons why universities are doing what they're doing now: switching to online classes and adopting the positions that they have taken with respect to tuition and fees and refunds. As plaintiff's counsel realize this, we may see some early settlements or dismissals as some of the ramifications, including the financial ramifications of the pandemic, become clearer.

**Jose Garriga:**

Thank you. A reminder, listeners, we're here today with Akin Gump litigation partner Hyongsoon Kim and counsel Molly Whitman discussing litigation resulting from colleges and universities moving classes online as a result of the coronavirus pandemic.

So, let's go back then. Molly, I'll turn to you on this. You mentioned that you're seeing one or more of these class actions filed per day. For those universities that have not yet been sued, what should they be looking out for?

**Molly Whitman:**

There are definitely a few things that universities can be looking at to try to get a sense of what people are thinking, about whether there's any litigation coming the university's way. One thing would be monitoring social media to see what students, parents and even university administrators or counselors or professors are saying. And to dial in on professors, professors are dealing most closely and frequently with students and they may be hearing student questions and concerns.

If and how professors choose to respond to those questions on social media, could indicate whether there's major unrest brewing. Another thing to look at would be student newspapers and also online petitions. We've seen a lot of change.org petitions come out from students asking their universities for some amount of refunds. And we've also seen some live protests.

One other thing I can think of to look out for would be plaintiff's counsel seeking out potential class representatives and targeting certain universities specifically. We mentioned before plaintiff's counsel have a strong interest in becoming class counsel. So they may not be waiting for potential claimants to come to them. And there are certain firms that have really attempted to carve out a niche in this area and are filing lots of cases, lots of class actions, specifically in the higher education sphere. So watching what they're saying and doing might help foreshadow whether litigation is coming.

**Jose Garriga:**

Thank you. All right, so, Hyongsoon, let me direct this question to you. A higher education institution gets sued. What are some approaches to consider in defense against this litigation?

**Hyongsoon Kim:**

Let me talk about that at a high level, because what I'll say at the outset is, obviously, there are a number of individual distinctions, I'm sure, that would reveal themselves at the university level between universities. But I do think there are certain issues and potential deficiencies that these complaints show across the board, so let me focus on those. And the first issue and probably an obvious one to think about is the terms of the university's contract with the student. And, in particular, the idea that there is no contractual right to an on-campus education. Many of these complaints, as Molly mentioned, state that students feel that they have the right to an on-campus education and thus moving that education online or off campus somehow results either in breach of

contract or in some other breach of some other right that the student has. But in asserting that right in complaints, often plaintiffs will focus on vague statements in marketing materials and other similar materials that are provided to students before the student actually arrives on campus.

In my view, many of those types of statements would not constitute part of the actual contract between the university and the student. In fact, those statements will likely constitute what's known as "puffery." There's a legal doctrine of puffery. These are statements that are not enforceable because of the nature of the statement. They're marketing statements; they're not factual representations, much less a binding contractual obligation.

The contract, to the extent any exists, is more likely to consist of materials that spell out the campus's policies and practices like a student handbook or a student manual or similar materials that are provided to students as part of the student onboarding to the university. And those policies and manuals often contain tuition refund policies and other helpful statements that limit the liability of a university for the type of allegations that are being brought in these complaints.

The second issue, I think, that's worth noting is, in my view, students are still receiving the fundamental benefits of an education at the university. So, yes, universities are switching to online often as opposed to in-person classes. But the material being taught is the same. The professors are the same. The student body is the same, and most importantly, the degree that is received by the students and the value of that degree is the same.

So, having received the fundamental benefit of the university education, the student then cannot complain simply because they're dissatisfied with the quality of that education. I'll give an example. You wouldn't imagine that a student could sue their university before the pandemic had started because her fellow students had missed some classes. I don't think there would be an argument that somehow that student's collegiate experience is somehow reduced or impaired because of poor attendance at her classes.

And, yet, somehow that has suddenly turned into an argument that you see in some of these complaints: that online classes are not as well attended. So, in my view, you have to separate out some of the peripheral allegations that are being made about the quality of an education from what the student really is signing up to receive at the university, which are these fundamental benefits that I just named. Molly also mentioned that there are claims specific to fees. We see a similar approach in these cases. Plaintiffs often use a blunderbuss approach. They claim any and all fees paid by students should be refundable in light of campus shutdowns. First of all, the point I made earlier about policies and manuals containing provisions with respect to tuition also applies here with respect to fees.

And, second, not all fees are created equal. Depending on the nature of the fee, universities may have unique defenses. There's the fee part of a package of fees that students typically pay in order to receive an education. Such fees are arguably not being paid in exchange for any particular service; there's simply a fee that the student has to pay in order to enroll. Is the fee the student is paying for a service that is still available online, whether wholly or partially?

And I would also ask the question: Would the student have used the service associated with the fee, to the extent there is any such service, even in the absence of the

pandemic? To me, this question goes to harm and to standing. I'll give an example. So, student pays an athletics fee that goes to maintaining athletic facilities on campus. Student doesn't use the gym at all, doesn't intend to use the gym.

That student clearly was perfectly comfortable paying that gym fee nonetheless while on campus. Now, the campus is closed. The university still has to pay costs to maintain that gym. To me, that student's conduct demonstrates that the student understood they had to pay that gym fee or athletic fee to attend the university. And that student didn't think that he or she was only required to pay this fee in order to personally benefit from it.

Some of these are questions and issues worth raising at the outset. There are also certain issues that may arise in defenses if any of these cases proceed to class cert. And for that, Molly, I invite you to jump in with any considerations you can think of as far as defenses at the class cert stage.

**Molly Whitman:** I was just going to mention that the example you just provided of the student who never steps foot in the gym and yet pays that fee for the athletic services at the beginning of the semester is a perfect dovetail into some of the things that will be considered at the class certification stage. And I'll also mention that a lot of what you just discussed would be tested out in the motion to dismiss stage. And, so, if the complaints make it through that hurdle of motion to dismiss practice, whether or not the court will certify the class will become what many would consider the make-it-or-break-it moment of a class action. Some of the requirements of class certification that are relevant to this discussion are commonality and typicality, which means that the questions of law or fact are common to the class, and the claims of the representative, the class representative, are typical of the claims of the class. And if the defense is able to do knock out some of the claims on a motion to dismiss, there's less to contend with during the class certification proceedings. A lot of the individual issues and the individualized issues that Hyongsoon just mentioned may preclude class certification.

Some of the issues that might make it difficult to achieve class certification would be whether a student would have benefited more from on-campus instruction, whether a student agreed to pay tuition because of promises made regarding an on-campus education, what representations were made to students and, even breaking it down more, different cadres of students, different groups of students, not all representations about courses or degree programs may be the same. Also, looking at implied-in-fact contracts, and what terms may be part of those implied-in-fact contracts. Whether any given student was harmed by any alleged breach of contract. There are also a lot of subjective issues that could preclude class certification. For example, how do you quantify the value of experiences? And, undoubtedly, some aspects of the college experience are going to be more important to some students than others. On the other hand, these are untested waters. And I can't say that enough. It will be awhile yet until we've seen any class certification motions make it to court in these cases. Some jurisdictions have strict requirements that class certification motions be brought within 90 days of filing the complaint. But we've seen just last year, in 2019, the 9th Circuit struck down the Central District of California's 90-day rule, and they said that it was incompatible with the Federal Rules' more lenient rule that class certification motions must be filed just in an early practicable time. And, so, although there are other jurisdictions that similarly have strict requirements like this, we're not sure how the courts will view those rules in light of the 9th Circuit's decision. And we're coming up on the 90-day mark from when the first cases started to be filed, but it will still likely be a while until we actually see class certification play out.

**Hyongsoon Kim:** Molly, just to jump in there, I think that's exactly right. And I think that's especially true given that, in the last several months, the same time period when all these cases have been filed, the courts have been shut down in an unprecedented way because of the pandemic and are only now starting to open up. So, really, these cases are only starting to get off the ground now. We're only just starting to see answers to the pleadings that were filed back in March. So, I completely agree. It's going to be months and months before we see any of these class cert matters play out.

**Jose Garriga:** Thank you both. So, just in closing, what are the main takeaways that you would offer listeners on this topic? Molly, if I could ask you to lead off.

**Molly Whitman:** It really remains to be seen how coronavirus has affected and will continue to affect the higher education industry. We do know that many other sectors, such as the airline industry, the health and fitness industries have also been the targets of widespread class action filings following closures or cancellations due to coronavirus. So, I think it's important to watch not only the developments in the university cases as they start coming before the courts, but also the developments in these other class action streams. But keep in mind that a key difference, I think, here for the university cases is that the universities have continued to provide instruction, as Hyongsoon mentioned, albeit through a different medium, but nevertheless, they're not dealing with complete cancellation, closure, stoppage of all provision of services. So it's just a different animal. So, as all of these cases move through the courts, we'll start to see trends emerge, as well as important ways to distinguish the university class actions from some of the other litigation we're seeing.

**Hyongsoon Kim:** The only thing I'll add to what Molly said is that these, in my view, these class actions are representative of the class actions that were filed as a result of the pandemic. As we've discussed, they were filed quickly, largely without regard for individual universities' and individual students' actual circumstances, the terms of the agreements, whether students were actually harmed. And as we've discussed, and as Molly's discussed in more detail, I think universities do need to take these cases seriously because of the amount of threatened liability. But there are many clear and distinct defenses that universities can assert, both early on and if these cases ever get to class cert. And we will certainly be following the progress of these cases with great interest.

**Jose Garriga:** Thank you. Listeners, you've been listening to Akin Gump litigation partner Hyongsoon Kim and counsel Molly Whitman. Thank you both for making the time to appear on the show today to bring listeners up to speed on this hot topic in litigation.

And thank you, listeners, as always for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* at your favorite podcast provider to ensure you do not miss an episode. We're on, among others, iTunes, SoundCloud and Spotify.

To learn more about Akin Gump and the firm's work in, and thinking on, litigation involving colleges and universities and on class actions, look for "Colleges and Universities" and "Class Actions" under "Litigation" at the Experience tab on [akingump.com](http://akingump.com) and take a moment to read Hyongsoon's and Molly's bios on the site as well.

Until next time.



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