Class Actions Alert

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Higher Education Institutions Should Prepare for Fallout from COVID-19

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Key Points

- Universities across the country have shuttered their campuses and moved classes online in reaction to the novel coronavirus outbreak, but may be the targets of class actions from students as a result.
- Public and private universities may face similar claims such as breach of contract, but whether they are public or private will affect the kinds of relief plaintiffs can seek.
- Defending these actions early is key to limiting liability and minimizing reputational impact.

The novel coronavirus (SARS-CoV-2) and its resultant disease (COVID-19) have caused a worldwide public health crisis. This crisis has hit the education sector particularly hard. Institutions that had touted the benefits of community-based learning have now shuttered most on-campus housing and services and transitioned to online classrooms. There is no doubt that these measures were prudent and unavoidable. But how universities have managed the financial aspects of this process has become a central concern for students, many of whom have paid thousands of dollars in tuition and fees for the Spring 2020 semester.

In general, most institutions have not refunded tuition; they may be suggesting or stating that online courses are reasonably equivalent to in-person instruction given the realities of the pandemic. Some have provided pro-rated or partial refunds of fees paid for on-campus housing, dining and other services that students can no longer access. But universities that have refunded less than 100 percent of paid tuition and fees face the prospect of class actions—and some have already been filed. Within the last few weeks, students or those who paid fees on their behalves have filed class actions against well-known institutions across the country, including the University of Arizona, Columbia University, Purdue University, Drexel University, Liberty University and the University of Miami. As the pandemic drags on, toppling summer programs and threatening fall programs, more class actions are a certainty.

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Though the makeup of claims and putative classes will undoubtedly vary, the central question is this: Must an institute of higher learning refund any portion of the fees and tuition paid due to COVID-19 closures? This article tackles that question in the context of potential class actions, but how courts will answer the question remains to be seen.

Class Action Framework

Class representatives file class actions on behalf of a group, or "class," of unnamed people alleged to have suffered a similar legal injury. At first blush, a class action may seem like an obvious choice for a collective student body to address grievances flowing from a particular set of actions taken by their university. But, as discussed below, colleges and universities have a variety of ways to defend class actions.

While class actions may be filed in state or federal court, this article focuses on class actions in federal court because nearly all state class action laws pattern Federal Rule of Civil Procedure (FRCP) 23, which governs class actions in federal court. Moreover, it is likely that a class action against a university would be filed in federal court or removable to federal court due to the expansive federal jurisdiction over class actions provided by the Class Action Fairness Act of 2005 (CAFA). Under CAFA, if any class member is diverse from any defendant, geographic minimal diversity is met; thus, in the university context, it is highly likely that putative class members would include those who reside outside of the state where the university is located. *See* 28 U.S.C. § 1332(d)(2).

A proposed class action must meet the requirements of FRCP 23(a) and at least one of the subsections of FRCP 23(b). Rule 23(a) specifies the four required characteristics of a class action:

1. A class of a size such that joinder of each member as an individual litigant is impracticable.
2. Questions of law or fact common to the class.
3. A class representative whose claims or defenses are typical of those of the class.
4. Who will adequately represent those interests.

FRCP 23(a)(1)-(4). A class action regarding fees and tuition will likely be alleged to satisfy FRCP 23(b)(2), which authorized a class action when a party has taken or refused to act with respect to a class, and final injunctive relief or corresponding declaratory relief is appropriate for the entire class, or FRCP 23(b)(3), where questions of law or fact common to members of the class must predominate over any questions affecting only individual members and a class action is superior to other available methods to adjudicate the controversy.

Identifying the Class

Recent coronavirus-related class action suits show the many ways to define the putative class. Because the suits center on funds paid for services or tuition, putative class members have been alleged as those who paid fees for or on behalf of currently enrolled students, rather than simply the students themselves.

While some of the litigants seek to represent one broad class consisting of those who paid various fees for students, others seek relief on behalf of more narrowly defined classes. For example, the putative class representative in the suit against Purdue

University brought claims on behalf of four separate classes: (1) the "tuition class" of all people who paid for in-person classes for the semester; (2) the "on-campus housing" class of all people who paid for on-campus housing and moved out due to the pandemic; (3) the "meals class" of students who paid for a campus meal plan; and (4) the "fee class" of students who paid other miscellaneous fees for the semester. On the other hand, the complaints against both Drexel University and the University of Miami—filed by the same plaintiffs' firm—purport to represent just one broad class:

"All students who are enrolled at Defendant's institution for the spring semester of the 2020 academic year, and who have paid tuition, mandatory fees, or voluntary fees for privileges or services that Defendant's institution has failed to provide and whose tuition and fees have not been refunded."

Segmenting the group into narrower classes as the Purdue plaintiff has done may be an attempt to balance the plaintiff's desire to be as inclusive as possible in naming the class, but to combat arguments against Rule 23 class certification on the basis that the questions of law or fact are not sufficiently common to the class. The courts will ultimately determine the contours of the class.

Types of Claims

Putative class representatives might assert claims for breach of contract, unjust enrichment and conversion to recover tuition or fees for classes sent online or services terminated or restricted due to coronavirus.

Breach of contract claims against colleges could proceed even where an explicit contract is not alleged if the court finds that an implied contract exists in the promises made in various materials provided by the school. Many state courts have held that "[p]romises set forth in a school's bulletins, circulars, and handbooks, which are material to the student's relationship with the school, can establish the existence of an implied contract." *Keefe v. New York Law School*, 897 N.Y.S.2d 94 (N.Y. App. Div. 2010). Whether a court will find an implied contract related to the payment of fees and tuition in these types of materials is an independent matter of state law.

But a breach of contract claim seeking a tuition refund may fail if the defendant university can show it is truly a veiled claim for "education malpractice." Courts have often rejected purported education malpractice suits, where disgruntled students allege that they did not receive an adequate education. A suit requesting a refund of tuition because online classes are allegedly inferior to in-person classes must necessarily demonstrate just *how* those online classes fail to provide the bargained-for educational experience. Plaintiffs' attorneys may ultimately struggle to convince a court that a suit seeking a tuition refund is anything other than an education malpractice claim.

Further, plaintiffs may attempt to support their claims that their universities have improperly retained fees and tuition by arguing that online classes are not a sufficient replacement for in-person instruction and the lifestyle experience on campus, or that it is improper to retain certain fees or tuition if the cost to provide the online courses is less than the cost to provide them on campus. Such arguments would probably not be considered at the pleadings or class certification stages, but rather might be examined during summary judgment or in consideration of damages.

The Public/Private Distinction and Related Relief

Whether these types of suits will gain any traction in court may depend on whether the defendant school is a public or private institution. In general, private colleges are subject to suit because they are treated as private entities that can sue and be sued. Accordingly, the suits filed against private colleges Columbia University, Drexel University, the University of Miami and Liberty University request the award of damages, among other relief. But some public universities may be able to counter damages claims by invoking the 11th Amendment's sovereign immunity protection of states, which includes arms of the state, unless the state has waived that sovereign immunity via legislation. If the class action complaint against a public university seeks monetary relief and does not allege a statutory or other waiver of sovereign immunity, the complaint may be dismissed.

For this reason, plaintiffs suing public universities may attempt to seek injunctive relief commanding the university to disgorge certain funds rather than damages because "Eleventh Amendment immunity, however, is not a bar to non-monetary, prospective injunctive relief or the fees and costs involved in obtaining such relief." *Stewart v. Morgan State Univ.*, CIV.A. DKC 11-3605, 2013 WL 425081, at *4 (D. Md. Feb. 1, 2013). For instance, the suits against the Arizona Board of Regents (the governing body for the public universities the University of Arizona, Arizona State University and Northern Arizona University) and public Purdue University and its Board of Trustees do not request the award of damages *per se*, but rather request injunctions declaring that the defendants have wrongly withheld funds that should be returned to the students and enjoining the defendants from continuing to retain such funds. It is questionable, however, whether a court would support this approach, or whether it would dismiss the suit as improperly characterizing a claim for monetary relief as a claim for injunctive relief.

Strategies to Defend Early

In addition to the financial impact of defending against these putative class actions, universities will undoubtedly suffer political and reputational damage the longer these cases remain active. Therefore, obtaining early dismissal or defeating class certification is critically important.

Both private and public universities may have strong arguments for Rule 12(b)(6) dismissal. Standard pleading defenses may also apply, such as the failure to properly plead a breach of contract claim under Rule 8. Even where plaintiffs plead the existence of a valid contract, several affirmative defenses may apply, including the application of contractual *force majeure* or Act of God provisions. In a time when the World Health Organization has declared a "public health emergency of international concern," defendant universities may have a strong argument that performing under any purported contract has become impossible. At the same time, moving courses online will arguably support a showing that universities have mitigated the situation to the best of their abilities. Moreover, if the university has stated a refund policy in its materials, a court may find those materials binding on students.

No matter how plaintiffs choose to frame their claims, if they survive a motion to dismiss they must still satisfy Rule 23 for the class action to be certified. Where plaintiffs claim that students are entitled to pro-rated refunds based on the inability to use services, for example, determining which services each student paid for and how much they utilized those services prior to campus closures will be a highly individualized inquiry that precludes class certification. Plaintiffs may struggle to show

that the class members have suffered a common injury because the type and amount of fees paid for various services may depend on any number of factors, such as whether the student chose to live on or off-campus or whether any amount of the services or tuition were paid for by other sources such as grants or scholarships. And though the currently filed cases have yet to mention another cadre of students, those participating in half- or full-year study-abroad programs who have had those programs cut short, those students will have entirely different financial burdens and logistical issues in completing their year of study. These nuances could help convince a court that no class can be certified because each student's agreements with the university must be analyzed independently.

Conclusion

Just as COVID-19 has altered the postsecondary educational landscape, so may it alter the jurisprudence of class actions filed against public and private universities. As more and more petitions arise calling for schools to refund payments or provide financial assistance to students, it is to be expected that more class actions will not be far behind. While universities have been undeniably impacted by the pandemic, how courts handle these class actions that are in many ways the first of their kind will have a lasting effect on university relationships with their students.

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