

## Advisory

### Monitoring Class Claims Filed Against Colleges and Universities for COVID-19-Related Interruptions

Because of the COVID-19 pandemic, many higher education institutions have decided to transition to distance (*i.e.*, online) learning for the rest of the spring semester. These decisions are generally consistent with governmental guidance and, in some cases, may be mandated by government orders issued in response to the pandemic. Because instruction is continuing, many institutions are not currently providing tuition refunds. It appears most (but not all) of these same institutions are offering prorated or partial refunds for other payments or fees relating to on-campus activities and services, such as housing, dining, athletics, and parking.

Over the past weeks, at least four putative class actions have been filed against higher education institutions over COVID-19-related interruptions. These suits seek partial refunds of tuition, other payments, or both. The plaintiffs in these cases include both parents of students and students themselves. This advisory summarizes these recently filed lawsuits, which will slowly begin to generate motions and orders that could provide insight into how the courts will view these types of claims. With a focus on tuition refunds, it also identifies some of the most important questions of law and fact that the courts will ultimately have to resolve, a number of which could be issues of first impression in many states.

#### SUMMARY OF CURRENT LITIGATION

Each of these cases is in the very early stages. As of April 16, 2020, the defendants have filed no responsive pleadings.

#### ***Rosenkratz, et al. v. Arizona Board of Regents, Case No. 2:20-cv-00613-JZB (D. Ariz. Mar. 27, 2020).***

Allegations: In March, the parents of two students attending the University of Arizona and living in on-campus housing filed a putative class action lawsuit in Arizona federal court against the Arizona Board of Regents. Because of the COVID-19 pandemic, the University of Arizona transitioned all classes to online learning and asked students living on campus to move out if they had suitable alternative housing. Both students heeded the University's request and moved off campus. While the plaintiffs acknowledge that the decision to transition to online learning and the request that students leave on-campus housing were "responsible," they complain that they "have not been offered or provided an adequate refund of the cost of room and board for which they paid on behalf of their children<sup>1</sup>... [and] have neither been offered nor provided a refund of any fees which they paid on behalf of their children."

The Putative Classes: The plaintiffs seek to represent two classes of students enrolled at the University of Arizona, Arizona State University, and Northern Arizona University in the Spring 2020 semester: (1) all people who have paid the costs of room and board for or on behalf of students; and (2) all people who have paid fees for or on behalf of students.<sup>2</sup>

**The Claims Asserted And Damages Sought:** The plaintiffs bring claims for breach of contract, unjust enrichment, and conversion. The plaintiffs seek to disgorge from the Arizona Board of Regents “the pro-rated, unused portion of fees, proportionate to the amount of time that remained in the Spring 2020 semester when classes moved online and campus services ceased being provided, as well as the return of the pro-rated, unused portion of room and board paid for housing and meals, proportionate to the amount of time that remained in the Spring 2020 semester when students needed to move out of their on-campus housing.”

***Dixon v. University of Miami, Case No. 2:20-cv-01348-BHH (D.S.C. Apr. 8, 2020).***

**Allegations:** In April, a University of Miami student filed a putative class action in South Carolina federal court seeking damages related to the University’s decision to suspend all on-campus activities and transition to online learning. The plaintiff contends that she paid tuition and certain mandatory fees as a precondition to enrollment. She states that the mandatory fees include fees that cover the costs of opportunities and services that Miami only provides while students are on campus, such as: (1) student activity fees; (2) athletic fees; (3) wellness center fees; (4) student health and counseling center fees; and (5) student center fees. She also alleges that Miami charges optional fees for other activities and services that only benefit students while on campus, such as room and board, parking, and intra-mural and extra-curricular activities. The plaintiff does not allege that she paid any of these voluntary fees or lived on campus.<sup>3</sup>

There are a number of allegations that focus on the alleged benefits of online versus in-person instruction. The plaintiff alleges that she chose to attend Miami, in part, because it provides an in-person curriculum with a campus experience. She quotes the University discussing the benefits of living on campus and alleges that the University “markets the on campus experience as a benefit of enrollment.” The plaintiff also claims that the tuition and fees for in-person instruction at the University of Miami are higher than the tuition and fees for online institutions because the amounts cover “not just the academic instruction, but encompass an entirely different experience,” including “face to face interaction with professors,” “hands on learning and experimentation,” “access to facilities,” and “social development and independence.” The plaintiff alleges that she has been deprived of these benefits. She also claims that “the value of any degree issued on the basis of online or pass/fail classes will be diminished for the rest of Plaintiff’s life.”

**The Putative Class:** The plaintiff seeks to represent a class of students enrolled at Miami for spring 2020 who 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.”

**The Claims Asserted And Damages Sought:** The plaintiff asserts a claim for breach of contract and seeks to recover damages, including “reimbursement of certain tuition, fees, and other expenses that were collected by Defendant for services that Defendant has failed to deliver.” She also asserts a claim for unjust enrichment, in which she seeks to disgorge from the University of Miami tuition and fees paid for services that have not been provided.

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***Rickenbacker v. Drexel University, Case No. 2:20-cv-01358-BHH (D.S.C. Apr. 8, 2020).***

On the same day the University of Miami case was filed, the same South Carolina law firm that represents the Miami student filed a putative class action on behalf of a Drexel University student in South Carolina federal court. That putative class action seeks damages related to the University's decision to suspend all on-campus activities and transition to online learning as a result of the COVID-19 pandemic and is substantively the same as the complaint filed against Miami.

***Church v. Purdue University, et al., Case No. 4:20-cv-00025 (N.D. Ind. Apr. 9, 2020).***

Allegations: In April, a Purdue University senior filed a putative class action against the University in an Indiana federal court seeking to disgorge from the University prorated tuition and monies paid for on-campus housing and meals and other fees.

Unlike the plaintiffs in other cases, the Purdue student points to a specific way that he claims online learning has diminished his learning experience. Because of the move to online learning, he alleges that he has been "unable to finish his senior year engineering project – constructing an airplane," and he alleges that "[n]o online course can simulate the applicable, real-world experience" he hoped to gain from this project. He also cites a Brookings Institute study of students enrolled in DeVry University online courses versus DeVry University in-person courses. According to the plaintiff, that study concludes "that students in online courses perform substantially worse than students in traditional in-person courses and that experiences in these online courses impact performance in future classes and their likelihood of dropping out of college as well."

The plaintiff also alleges that the \$750 refund offered to students like him who decided to move out of on-campus housing at the University's recommendation is inadequate. Similarly, he alleges that the University "failed to adequately reimburse students with a refund of the amounts paid (on a pro-rated basis) for meals."<sup>4</sup> As for fees, he claims the University "failed to offer students a refund of any of the fees they paid for the semester that were unused or for which they had not received a benefit[.]"

The Putative Classes: The plaintiff seeks to represent four classes: (1) a tuition class consisting of people who paid tuition for or on behalf of students who were "denied in-person instruction and forced to use online distance learning platforms"; (2) an on-campus housing class, consisting of people who paid for on-campus housing for or on behalf of students that "moved out of their on-campus housing... because of the University's policies and announcements related to COVID-19"; (3) a meals class consisting of "people who paid costs for meals and on-campus dining at the University for the Spring 2020 semester"; and (4) a fee class consisting of "people who paid fees for or on behalf of students enrolled at the University in the Spring 2020 semester."

The Claims Asserted And Damages Sought: The plaintiff asserts claims for breach of contract and unjust enrichment and seeks for himself and on behalf of the putative class: (1) "disgorgement of the difference between the

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value of one half a semester of online learning versus the value of one half a semester of live in-person instruction in brick and mortar classrooms”; (2) “disgorgement of the unused days of housing costs already charged”; (3) “disgorgement of the pro-rated, unused amounts of costs already charged and collected [for meals]”; and (4) “disgorgement of the pro-rated, unused amounts of costs already charged and collected [as fees].”

## ISSUES TO MONITOR

As these pending cases unfold (and as others are filed), a body of precedent applicable to student claims for tuition refunds may emerge. This advisory highlights some of the issues that colleges and universities may want to focus on as they monitor these cases.

### **Will a predominant or most-viable theory of recovery emerge?**

The lawsuits seeking a prorated refund of tuition (*Miami*, *Drexel*, and *Purdue*) have asserted claims for breach of contract and unjust enrichment. As general matter, these two claims must be asserted in the alternative because unjust enrichment and similar equitable or quasi-equitable claims typically only apply when there is no valid contract. It is not clear which of these alternative theories (if either) will emerge as the most favored, and each state may be different.

In many states, there has been a historical tendency to treat the relationship between students and universities as one that is “contractual in nature” but with universities afforded more deference as to their manner of performance than would be the case in a strict contract analysis.<sup>5</sup> Against this backdrop, courts may be inclined to find that a valid contract exists, even if a traditional written contract signed by both parties is not readily identifiable. Instead, the contractual relationship may be set forth in the “catalogues, bulletins, circulars, and regulations of the institution made available to the [student].”<sup>6</sup> And, if these materials include purely aspirational statements (*e.g.* mission statements or goals), courts may be less likely to view those statements as contractual. The exact nature and terms of any contractual relationship between the students and a university may, however, be a heavily litigated issue in some cases.

Some jurisdictions have avoided the task of identifying a valid contract between the student and the university by concluding that the relationship is one of implied contract.<sup>7</sup> Whether other courts will conclude that these student refund claims are more readily addressed as equitable or quasi-equitable claims, such as unjust enrichment, which do not require the identification of a valid contract, remains to be seen. The result may depend on whether prior precedent in each university’s state already creates a presumption that these student/university relationships should be viewed as contractual and on the particular facts of a given case.

### **If the relationship is contractual, how will the courts determine whether there has been a breach?**

In many instances, the documents creating a contractual relationship may expressly afford a level of discretion to the university.<sup>8</sup> Even in the absence of such a statement, many courts have historically hesitated to interfere with

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university decisions on core academic issues.<sup>9</sup> Thus, some courts have only been willing to interfere with a university's decisions on such matters where the university's actions were arbitrary and capricious.<sup>10</sup>

Therefore, courts should be inclined to defer to an institution's decision that online education adheres to the institution's academic standards.<sup>11</sup> Courts may also defer to decisions made to protect the health and safety of students, faculty, and staff, such as the move to online education during this pandemic.<sup>12</sup> Depending on the jurisdiction and the particular circumstances presented, the historical deference that the courts have often embraced when passing judgment on university decisions should provide universities with a strong defense to tuition refund lawsuits. In fact, given the government orders banning gatherings and the health risks that would be posed by ignoring these orders, courts may well be inclined to give enhanced deference to a university's decision to move to online learning. It is difficult to identify any other decision that institutions of higher learning could make in these unprecedented circumstances.

### **What proof of damages will be required under a breach of contract theory?**

Typically, damages for a breach of contract are intended to put the plaintiff in the same position he or she would have occupied had the breaching party fully performed the contract. Thus, in the current suits, the students seek the difference between the value to them of an on-campus educational experience and the supposedly lesser value of their current online experience. Courts will generally require the students to prove this difference in value with some level of specificity.

The plaintiffs in *Miami*, *Drexel*, and *Purdue* cite at least four general reasons for the contention that their current online learning is less valuable to them than the on-campus learning for which they supposedly bargained: (i) lost opportunities to interact face-to-face with professors and peers; (ii) lack of access to libraries, computer labs, and other hands on learning experiences; (iii) lost opportunities for social development and satisfaction; and (iv) the fact that online degrees generally cost less and may be viewed as less valuable and prestigious.

It is not clear that any of these factors demonstrate that the temporary online education offered in response to the COVID-19 pandemic is any less valuable to a student than an on-campus education, especially for students continuing with a full course load and who remain on track to obtain their degrees. Online technology can recreate many of the allegedly lost opportunities. And the suggestion that what online-only schools have charged for their degrees can be used to value online education being offered by universities in the current circumstances is not compelling. The online services that universities are now offering are presumably far more interactive and substantively robust than what online-only schools have ever offered. Lastly, it is difficult to assign a non-speculative monetary value to many of the factors to which the plaintiffs point, such as lost social development. Courts should be skeptical of such damages theories.

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**What role, if any, could legal excuse theories play?**

While *force majeure* contractual clauses and common law doctrines like impossibility are front of mind for many in the current environment, it seems unlikely that these doctrines of excuse will play a prominent role in the resolution of tuition-refund lawsuits. First, the front line defense for many institutions will be that they are performing within the bounds of the discretion that the law gives them to confront the current crisis. Universities will not commonly argue that there is a failure of performance that needs to be excused. Second, it seems unlikely that the documents comprising a tuition contract would have a *force majeure* clause. If such a clause is present, it is possible that it could provide some protection. This would depend on the specific remedial language, which varies greatly among *force majeure* clauses. Third, if a university asserted that some portion of its performance was rendered impossible by (for example) government shelter in place orders, it might receive a ruling identifying certain services that it is excused from providing. But, in some states, the impossibility doctrine may then provide the students with an equitable claim to recover the value of the services that they did not receive (and that the university was excused from providing) because of the government orders. Thus, the appeal of asserting this doctrine as a defense may be limited.

**If the relationship is not one of contract, how will the court balance the equities?**

In an unjust enrichment claim, the plaintiff must usually prove that the defendant received a benefit (here, tuition) that it should not, in good conscience, be allowed to fully retain. Whether a university received tuition that it does not equitably deserve to retain (in whole or in part) will typically depend on a balancing of the equities. While the courts have discretion to do justice while engaged in this balancing act, many jurisdictions will still often require that the allegedly undeserved benefit be proven with some degree of certainty.

These claims may, practically speaking, turn on whether the courts conclude that universities are receiving a windfall (or making an undeserved profit) by retaining tuition but then providing a supposedly less expensive online educational experience. This seems an unlikely conclusion. The universities have not moved to online learning in an effort to increase profit or to advance some strategic interest. Rather, they have done so out of necessity. Moreover, many institutions have not only continued to incur the costs of paying professors and other overhead expenses during online learning, but they have also incurred substantial additional and unexpected costs associated with training professors to deliver online learning and purchasing the technology necessary to do so. Still further, many of these institutions are non-profit organizations, some of which may be directly involved in efforts to combat the current crisis. Courts may well prove to be unmoved by the supposed inequity that students are claiming in this environment.

**Can these claims be resolved on a class-wide basis?**

These lawsuits have been filed as putative class actions. At the outset, it appears that these proposed classes are burdened with the individualized (student-by-student) questions that typically preclude class treatment. Students may have varying contractual relationships with their schools. The impact that online learning has had on each student's education may be different, leading to different results when the equities of a situation are balanced or an attempt to calculate damages is made. These types of individual inquiries should weigh heavily against class certification.

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These cases present legal and factual questions that could be matters of first impression in some jurisdictions. While existing case law and legal doctrines provide a framework for evaluating these claims, how the courts adjudicate these early cases may significantly impact whether, and in what form, additional universities and colleges will be sued for COVID-19-related refunds.

<sup>1</sup> The University of Arizona has offered students a 10% refund on room and board at the end of the semester or a 20% credit to be added to a student's account next year. If a selection is not made by April 17, 2020, the 10% credit will be applied.

<sup>2</sup> While each of these institutions are governed by the Arizona Board of Regents, their responses to the COVID-19 pandemic have not been the same, including with regard to the return of room and board. See <https://www.insidehighered.com/news/2020/04/06/colleges-announce-room-and-board-refund-plans-students-are-asking-more>.

<sup>3</sup> The University of Miami is offering prorated refunds for room and board. <https://engagecanes.force.com/CC/s/article/COVID-19-Can-I-get-a-refund-for-my-housing-costs-since-I-am-no-longer-on-campus>. It has also offered prorated refunds for parking. <https://engagecanes.force.com/CC/s/article/COVID-19-Will-parking-be-reimbursed>. It is unclear what the University of Miami's policy is with regard to the refund of fees.

<sup>4</sup> Purdue has agreed to roll over any unused meal plan dollars to the next semester. If a student is graduating, the student may also receive a refund for unused meal plan dollars. See <https://coronavirus.purdue.edu/updates/letters-to-our-residents/>.

<sup>5</sup> *Doherty v. Southern College of Optometry*, 862 F.2d 570, 577 (6th Cir. 1988) (collecting cases); *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992) (same).

<sup>6</sup> *Ross*, 957 F.2d at 416; but see *Knelman v. Middlebury Coll.*, 898 F. Supp. 2d 697, 709 (D. Vt. 2012), *aff'd*, 570 Fed. Appx. 66 (2d Cir. 2014) (a statement "in a college handbook or other official statement that is merely aspirational in nature, or that articulates a general statement of a school's "ideals," "goals," or "mission," is not enforceable.").

<sup>7</sup> See, e.g., *Suhail v. Univ. of the Cumberland*, 107 F. Supp. 3d 748, 757 (E.D. Ky. 2015).

<sup>8</sup> University policies or handbooks may also contain grievance procedures that a student is required to follow or may require that disputes be resolved in a particular forum or through alternative dispute resolution procedures.

<sup>9</sup> See, e.g., *Suhail*, 107 F. Supp. 3d at 755 (institution had discretion to add requirements different from what was marketed to the students); *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976) (the courts grant "wide latitude and discretion... to educational institutions in framing their academic degree requirements.").

<sup>10</sup> See, e.g., *Doherty*, 862 F.2d at 577 (citing to *Mahavongsanan*).

<sup>11</sup> Of note, the Department of Education's guidance for institutions receiving Title IV funds states that "[f]or many institutions, online education will provide a viable option for continuing to teach students through COVID-19-related interruptions." See [https://ifap.ed.gov/electronic-announcements/030520Guidance4interruptionsrelated2CoronavirusCOVID19?mod=article\\_inline](https://ifap.ed.gov/electronic-announcements/030520Guidance4interruptionsrelated2CoronavirusCOVID19?mod=article_inline)

<sup>12</sup> See *Paynter v. New York Univ.*, 66 Misc. 2d 92, 92, 319 N.Y.S.2d 893, 894 (App. Term 1971) (holding that student's father was not entitled to a refund for instruction time lost where NYU cancelled classes after protests broke out on numerous college campuses following the invasion of Cambodia in 1970 and students were killed during a protest at Kent State); see also *id.* ("while in a strict sense, a student contracts with a college or university for a number of courses to be given during the academic year, the services rendered by the university cannot be measured by the time spent in a classroom" and universities "have inherent authority to maintain order on their campuses").

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