

## Advisory

### UPDATE (1): Monitoring Class Claims Filed Against Colleges And Universities For COVID-19-Related Interruptions

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This Advisory supplements and updates [Monitoring Class Claims Filed Against Colleges and Universities for COVID-19 Related Interruptions](#).

In the last week, students and their parents filed three more COVID-19 tuition and fee refund class actions against universities and colleges. Further, the plaintiffs in *Rosenkrantz, et al. v. Arizona Board of Regents*, Case No. 2:20-cv-00613-JZB (D. Ariz. Mar. 27, 2020), the first virus-related university lawsuit, have amended their complaint. While these new (and amended) complaints raise many of the same legal and factual issues discussed in our previous Advisory, they also raise some additional issues worth tracking.

#### SUMMARY OF RECENT CASES

##### ***Student A v. Liberty University, Inc. d/b/a Liberty University, Case No. 6:20-cv-00023-NKM (W.D. Va. Apr. 13, 2020).***

**Allegations:** Represented by two of the same law firms that filed the *Rosenkrantz* lawsuit, the plaintiff, who is proceeding anonymously as “Student A,” filed a putative class action lawsuit in a federal court in Virginia seeking damages for the suspension of in-person learning and other on-campus services because of COVID-19. The complaint contends that the student paid fees for the spring 2020 semester, including fees for dining, housing, student health, and student center fees, among others. The student does not seek to recover tuition.

According to the complaint, unlike most other universities, Liberty purported to remain open – even though it had moved classes on-line, converted dining halls to take-out only, and closed other campus facilities – so that it could retain fees and avoid offering pro-rated refunds for those fees. The University is offering a \$1,000 credit applied to the fall 2020 semester for students who chose to move off campus, which is being offered as a “customer service measure.” The student contends that this is not the “full pro-rated, unused portion of” housing payments. Moreover, to receive the credit, the complaint alleges that students had to fill out a form informing the University that they were not returning to campus by March 28, 2020. The complaint alleges that many students missed the deadline because Liberty did not communicate the deadline clearly or provide adequate time and information. The student claims that Liberty’s decision to tell students that campus remained open was “not only illusory and empty” but also “extremely dangerous and irresponsible.” The complaint includes several allegations regarding attempts by Liberty to “stifle dissent regarding its unreasonable, outlier position, that it will not provide adequate refunds.” The complaint also states that Liberty will receive about \$15 million in stimulus funds intended to help students.

**The Putative Class:** The plaintiff seeks to represent a single class comprising of anyone who paid fees for the spring 2020 semester.

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**The Claims Asserted And Damages Sought:** The plaintiff brings claims for breach of contract, unjust enrichment, and conversion, seeking “disgorgement of the pro-rated, unused portion of fees, proportionate to the amount of time that remained in the Spring 2020 semester when classes were moved online.”

***Carpey, et al. v. University of Colorado, Boulder, through its Board, The Board of Regents of the University of Colorado, a body corporate, Case No. 1:20-cv-01064-NRN (D. Colo. Apr. 15, 2020).***

**Allegations:** The plaintiffs, a student at the University of Colorado, Boulder and her father (who paid the tuition and fees), brought a putative class action in federal court in Colorado. The plaintiffs are represented by the same firm that filed the lawsuits against the University of Miami and Drexel University, which are further described [here](#). As in those other suits, the plaintiffs here allege that they paid tuition and fees for in-person on-campus services and benefits that they are no longer receiving as a result of Colorado’s decision to suspend in-person on-campus activities in response to the COVID-19 pandemic. With respect to tuition, the plaintiffs claim that the move to online learning deprived them of the value of in-person learning and diminishes the value of their future degrees. The complaint alleges that Colorado is offering pro-rated refunds for room and board and some fees, but not for tuition or the fees specifically challenged in the complaint.

**The Putative Class:** The plaintiffs seek to represent two classes of individuals: (1) a tuition class, and (2) a fees class.

**The Claims Asserted and Damages Sought:** The plaintiffs assert claims for breach of contract and unjust enrichment and seek to disgorge from the defendants “the difference between the value of one half semester of online learning versus the value of one half semester of live in-person instruction in a physical classroom” and “the pro-rated, unused amounts of the fees already charged and collected.”

***Raftopoulous-Johnson, et al. v. Arizona Board of Regents, Case No. 2:20-cv-04399-BRM-ESK (D.N.J. Apr. 17, 2020).***

**Allegations:** This is the second lawsuit filed against the Arizona Board of Regents for the refund of fees related to COVID-19. Unlike *Rosenkrantz*, this case seeks tuition refunds and is limited to Arizona State University. The plaintiffs are a mother and her son, an Arizona State University student, who claim to have paid “combined” amounts for tuition and fees for the spring 2020 semester. This case was filed as a putative class action in federal court in New Jersey, where the plaintiffs reside. Along with alleging that students are not receiving services paid for by fees like the “Student Initiated Fee” and parking fees, they claim that the remote learning services they are receiving “are in no way equivalent” to the in-person education they paid for. Like other plaintiffs, they allege that some of the educational benefits that they paid for but are not receiving include “face to face interactions” and “social development and independence.” The plaintiffs allege that they would have paid less for online learning at the university pre-pandemic and point to the difference in tuition between a semester of in-person education and a semester of online learning.

**The Putative Class:** The plaintiffs seek to represent a single class of “all people who paid ASU Spring

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Semester 2020 tuition and/or fees for in-person educational services that ASU failed to provide, and whose tuition and fees have not been refunded.” They also seek to represent a subclass of class members that reside in New Jersey.

The Claims Asserted and Damages Sought: The plaintiffs bring claims for breach of contract, unjust enrichment, and conversion and seek to recover the pro-rated portions of tuition and fees, as well as punitive damages.

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

Amended Allegations: The plaintiffs in this lawsuit against the Arizona Board of Regents amended their complaint last week. The amended complaint adds new plaintiffs, including plaintiffs who attend Arizona State University and North Arizona University, and updates the allegations to reflect changes in the refunds offered by the universities since the original complaint had been filed. The amended complaint also adds an allegation stating that the three universities will receive over \$400 million combined from federal stimulus funds designed to help students.

**ADDITIONAL ISSUES TO MONITOR**

**How will courts react to seemingly dubious conversion claims?**

*Liberty* and *Rosenkrantz* both bring conversion claims for fees, and *Raftopoulous-Johnson* brings a conversion claim for tuition and fees. Some plaintiffs, like *Raftopoulous-Johnson*, may choose to bring a conversion claim to justify seeking punitive damages, which are generally not recoverable for contract claims or quasi-equitable claims like unjust enrichment. Conversion is a tort that typically requires a showing that “(1) the plaintiff was the owner of the property or was entitled to its possession; (2) the defendant took possession of the property with the intent to exercise some control over it; and (3) the defendant thereby deprived the plaintiff of the right to possession.” 18 Am. Jur. 2d Conversion § 2. In many jurisdictions, claims for conversion of money will fail because money is fungible, and plaintiffs typically are not claiming that their right in a certain identifiable set of marked bills has been interfered with. *Id.* at § 93. Perhaps in an attempt to avoid this frailty, the plaintiffs in these cases have pleaded their conversion claims as interference with their right to the services they paid for. This theory is unlikely to succeed in many jurisdictions because the subject of the conversion generally must be personal property that is tangible. *Id.* at § 7.

Conversion claims also typically fail when based on the same set of facts as a breach of contract claim, which plaintiffs in these cases will almost certainly always assert.

**Have all jurisdictional requirements been met?**

Federal courts have limited jurisdiction to hear cases – like these university cases – that raise only state-law claims. If a federal court lacks jurisdiction to hear a case originally filed there, it must be dismissed (although the plaintiff would likely be able to refile in state court). So far, all of these cases have been filed in federal court, and all of them have claimed that the federal courts have jurisdiction under the Class Action Fairness Act (CAFA).

For jurisdiction to exist under CAFA, at least one of the putative class members must be a citizen of a state different from the university and the aggregate amount in controversy must be more than \$5 million. 28 U.S.C. §

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1332(d)(6). In these cases, many class members will undoubtedly be citizens of a different state from the university, so the diversity of citizenship requirement is easily met. Critically, however, the amount in controversy requirement may not be met because plaintiffs in these cases are demanding only pro-rated refunds. This may become an important issue, particularly for institutions with small student populations or with low fees or tuition.

In addition, schools with large local populations might invoke the local controversy exception. Federal courts must decline CAFA jurisdiction where, among other requirements, two-thirds of the putative class members are citizens of the forum state. *Id.* at § 1332(d)(4)(a). Although the burden of proving citizenship lies with the party invoking federal jurisdiction, universities should be able to show students' state citizenship, as those students have likely provided documentation to qualify for in-state tuition. Thus, schools with large in-state student populations may succeed in arguing that the federal court must decline jurisdiction.

### **How will questions of immunity be resolved?**

Public universities may be able to successfully assert immunity against these claims. First, the Eleventh Amendment protects states from being sued in federal court without the state's consent or a valid act of Congress. *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254 (2011). In many jurisdictions, Eleventh Amendment immunity extends to public universities and colleges as "arms of the state." In those jurisdictions, whether these actions will be able to proceed in federal court will depend on whether that state has waived its Eleventh Amendment immunity from suits for damages in federal court, something most states have not done. If these cases cannot proceed in federal court, they will be dismissed and the plaintiffs may seek to refile in state court.

There are also likely to be issues concerning sovereign immunity in state courts. While it may vary by state, the states generally enjoy immunity from suit absent a valid waiver. States may have waived sovereign immunity for some, all, or none of these types of claims. To that end, some states have waived sovereign immunity for breach of contract actions, but not equitable or quasi-equitable claims, such as unjust enrichment. And where states have waived sovereign immunity for certain claims, tort claims in particular, the state may require that litigants provide notice in advance of filing suit to allow the state an opportunity to settle the matter before incurring litigation costs.

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