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Colleges and Universities Face Class Action Lawsuits Regarding Coronavirus-Related Refunds

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The coronavirus (COVID-19) pandemic has fundamentally altered the nature of higher education. On March 6, 2020, the University of Washington became the first major university to cancel in-person classes. By the middle of March, higher education institutions across the United States had followed and today more than 1,000 colleges and universities have suspended in-person classes or moved to online instruction to limit the spread of the virus. Nearly every facet of college life, from admissions and enrollment to athletics and institutional finances, has been turned upside down by the COVID-19 public health crisis.

As quickly as colleges and universities have shifted to online learning, several class action lawsuits have been filed by students alleging, among other things, that they contracted for services, facilities, and opportunities, such as in-person academic instruction, and that as a consequence of institutional closures, they no longer received the full benefit of those contracts. To date, at least eight class action lawsuits have been filed against the Arizona Board of Regents, the University of Miami, Drexel University, Liberty University, Purdue University, Michigan State University, the Board of Regents of the University of Colorado, and Colorado State University's Board of Governors, claiming breach of contract, unjust enrichment, and conversion seeking refunds for spring tuition, room and board, and other fees.

It is expected that more of these cases will be filed in the coming weeks. In fact, the Anastopoulo Law Firm, which represents students in the class action lawsuits against Drexel University and the University of Miami, recently created a website, https://www.collegerefund2020.com/, with a notice reading, "Are you a college student who was forced to leave campus? You may be entitled to compensation."[1] The website further indicates that the firm "is actively seeking additional cases. We are accepting cases for all colleges and universities throughout the country." According to a recent news release, Milberg Phillips Grossman LLP, the New York-based law firm representing Michigan State University and Purdue University students, is part of a Coronavirus Litigation Task Force, made up of three firms that plan to "investigate suspected wrongdoing related to the COVID-19."

The Class Action Lawsuits (Generally)

The class action lawsuits differ in their claims, with some students seeking more relief than others from their respective institutions. For example, in nearly identical class action complaints filed in the U.S. District Court for the District of South Carolina against the University of Miami and Drexel University, plaintiffs allege that they are entitled to tuition refunds because "through admission agreement and payment of tuition and fees [they]

entered into a binding contract" with their respective institutions for numerous services and experiences which they have been deprived of due to their institutions' closing. In this regard, since social-distancing measures were implemented, they have been "deprived of the campus experience" and "the benefits of on-campus learning." Benefits of being on-campus and in-person academic instruction allegedly include but are not limited to: "(i) face to face interaction with professors, mentors, and peers; (ii) access to facilities, such as computer labs, study rooms, libraries, and laboratories; (iii) student governance and student unions; (iv) extra-curricular activities, groups, intramurals; (v) student art, culture and other activities; (vi) social development and independence; (vii) hands-on learning and experimentation; and (viii) networking and mentorship opportunities." Plaintiffs also claim unjust enrichment on the grounds that they conferred a benefit to their respective institutions (tuition and fees), which the institutions have retained without providing the services such benefit was premised upon, and contend that the decision by their respective institutions to shift to pass/fail grading this semester has diminished the value of their degrees.

In some instances, such as in the case against the Arizona Board of Regents, plaintiffs are not seeking reimbursement of tuition, and expressly recognize that the "decision to transition to online classes and to request or encourage students to leave campus were responsible decisions to make…" Plaintiffs in that case seek refunds of their room, board and other related fees for the unused portion of the spring 2020 semester after the University of Arizona, Arizona State University and Northern Arizona University closed their campuses due to the COVID-19 outbreak. In addition to alleging claims for breach of contract, unjust enrichment and conversion, the plaintiffs contend that while the Arizona Board of Regents offered nominal rent credits toward the next academic year, these credits are insufficient and not commensurate with their financial losses.

Many of the complaints also seek reimbursement for student service fees, recreation center fees, health and wellness center fees, library fees, student counseling fees, technology fees, athletics fees, financial aid fees, transportation fees and fees that are unique to institutions, such as Liberty University's "Rawlings School of Divinity Activity Fee."

Institutional Perspectives

With respect to online classes, most institutions take the position that there is no contractual obligation to provide a particular type of curriculum and online instruction is merely different in delivery and not in kind to classroom instruction. Although the method of delivery has shifted to an online format, institutions are continuing to meet accreditation requirements and students are receiving the same opportunity to earn academic credit to meet their degree requirements in exchange for their tuition dollars. Second, students continue to have access to institutional academic offerings and support, as online video platforms permit professor-student interaction and a virtual classroom environment. Broad classroom discussions can be achieved via message boards and many institutions are proactively working with students to host virtual mentoring and networking events so that students can receive benefits that they were receiving when they were physically present on campus.

The cost of delivering academic instruction and services as a result of the COVID-19 outbreak have not necessarily changed despite moving to online academic instruction (*e.g.*, faculty salaries and benefits). Moreover, the

underlying assumption of "unjust enrichment claims" — that colleges are saving money by being off campus — is erroneous, as some costs that have, in fact, increased, such as the costs associated with transitioning to and providing large-scale delivery of online courses (*e.g.*, technology licenses and large-scale remote networks).

In addition, many colleges and universities were mandated to close campuses by governmental order and/or to protect the safety of their communities in order to slow the spread of the virus. Therefore, while the loss of the on-campus experience is devastating, many institutions believe that they should not bear the burden of reimbursement, especially if they are meeting their obligations and continuing to provide academic instruction and services to students.

Proactive Steps for Institutions

As the consequences of the COVID-19 pandemic continue to evolve, it behooves institutions to review potential defenses and their existing contracts, marketing materials, and policies and/or make any changes as soon as practicable.

Colleges and universities should review tuition agreements, admissions agreements, room and board plans, handbooks and marketing materials to determine what promises, if any, were made to current or prospective students. For example, do current contracts indicate that all classes must be offered in-person? Do they explicitly require refunds to students if the institution is required to move classes online? Do housing agreements require a refund in the event the institution is required to evacuate students from the residence hall? Depending on the circumstances and jurisdiction, courts have considered student handbooks, bulletins, catalogs, and admissions materials as contracts. Institutions should also review any website pages that address or describe the cost of attendance, tuition, room, board and other related fees.

Next determine what services the institution is providing to students remotely and whether the institution has possible defenses or relief from contractual obligations. Analyze agreements for any force majeure provisions. *Force majeure* clauses generally contain a list of events that excuse parties from performance without it constituting a breach when circumstances beyond the parties' control render performance untenable or impossible. Be mindful, however, that courts typically read force majeure provisions very narrowly.

In some jurisdictions, colleges and universities can argue impossibility of performance in response to breach of contract claims, particularly when there is no force majeure provision in the agreement between the parties. The doctrine of impossibility states that if there is a change in circumstances, the non-occurrence of which was an underlying assumption of the contract, that renders the performance of a party's contractual obligations impossible, that party is excused from performance. Here, the assumption that a global pandemic would not occur was likely an underlying assumption between the parties. Further, the global pandemic arguably rendered the delivery of in-person classroom instruction, room and board, and other services impossible in many cases across the country depending on the location of the institution.

Institutions can also challenge class certification based on issues regarding the commonality and typicality of the class. For example, students of different academic standing (i.e., freshmen, sophomores, juniors, and seniors) may not be an appropriate class for class certification purposes. All federal cases must allege proper jurisdiction

under the Class Action Fairness Act (28 USC § 1332(d)), which, among other things, requires an amount in controversy that exceeds $5,000,000.00. Further, colleges and universities should consider whether all necessary and/or indispensable parties have been joined in the lawsuit. In addition to these issues and defenses, additional arguments may be available depending on an institution's jurisdiction and particularized circumstances.

Unfortunately, more of these cases will likely be filed in the next few weeks. The potential impact on college and university campuses is significant – operationally, financially, legally and otherwise – and preparation is key. We urge all colleges and universities to use this period to review and revise contracts and other publications, if necessary, to reflect the occurrence of a pandemic. Consider including specific language regarding non-issuance of refunds in the event of an uncontrollable shut down. Depending on the course of the COVID-19 pandemic and social distancing rules, college campuses may remain off limits in the fall semester and expectations for online learning and other support services (e.g. mental health counseling, advising) may be higher given that institutions will have had more time to prepare. Colleges and universities that embrace the challenge will be positioned to meet the formidable challenges ahead.

If you have questions regarding any aspects of higher education law or coronavirus-related refunds, feel free to contact James G. Ryan at (516) 357-3750 or via email at **jryan@cullenllp.com**, Kevin P. McDonough at (516) 357-3787 or via email at **kmcdonough@cullenllp.com**, Dina L. Vespia at (516) 357-3726 or via email at **dvespia@cullenllp.com**, or Hayley B. Dryer at (516) 357-3745 or via email at **hdryer@cullenllp.com**.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

Footnote

[1] *College Refund 2020*, Anastopoulo Law Firm, https://www.collegerefund2020.com/ (last visited Apr. 22, 2020).

Practices

- Higher Education

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