

# From Class to Class Action Lawsuits: Considerations for Colleges and Universities Facing Coronavirus-Related Student Refund Actions

The coronavirus pandemic has radically transformed the nature of higher education and posed unprecedented challenges for colleges and universities across the country. Students who used to spend their days on campus are now required to stay home and practice social distancing. Higher education institutions inevitably had to advocate, and sometimes require, that students vacate on-campus housing in order to safeguard their communities and avoid the spread of the virus. Most, if not all, institutions have been diligently working to maintain the substance of the educational experience by rapidly transitioning classroom courses to remote instruction using online platforms.

With this mandated shift to a virtual college experience, several institutions now face class action lawsuits by students claiming that they are entitled to reimbursement of costs and fees as a result of campus closures. As institutions continue to address the daily issues that arise as a result of the global pandemic, a new challenge has emerged: they must defend against these lawsuits while minimizing the potential impact to institutional budgets and reputational harm. As the pandemic continues, more class actions are likely, and institutions are taking proactive steps to mitigate their potential exposure.

## A Nationwide Outbreak of Litigation

As of May 4, 2020, over 50 refund class action lawsuits had been filed against colleges and universities across the country since late March when the first action was filed against the Arizona Board of Regents.<sup>1</sup> This number continues to grow each day, with a number of institutions facing more than one class action.<sup>2</sup> One firm, which represents students in many of the lawsuits, created a website advertising the class actions and encouraging students to join.<sup>3</sup>

A few law firms have filed the vast majority of the lawsuits alleging comparable claims.<sup>4</sup> For example, the aforementioned firm<sup>5</sup> represents students in the lawsuits filed against, among others, the University of Colorado-Boulder, the University of California, the Board of Trustees of Boston University, the cases against the North Carolina Universities, and one of the two lawsuits filed against both Drexel University and University of Miami, as well as at least five New York institutions.<sup>6</sup> Another firm<sup>7</sup> is representing students in the lawsuits against the Pennsylvania State University, one of the two lawsuits against each Drexel University, University of Miami, and the Arizona Board of Regents, as well as at least seven of the New York institutions.<sup>8</sup>

Finally, the two firms<sup>9</sup> that filed the first action on March 27, 2020, against the Arizona Board of Regents, have subsequently filed various suits on behalf of students including those against Liberty University, Grand Canyon University, the Board of Trustees of the California State University, and the Regents of the University of California.<sup>10</sup> A distinguishing factor between the lawsuits this team has filed and those filed by the other firms in this space is that this team's complaints are not seeking reimbursement of tuition.<sup>11</sup>

## Claims in Contract and Tort

The students' claims include breach of contract and unjust enrichment, with some also alleging conversion. The students claim, among other things, that they contracted for services, facilities, and opportunities, such

as in-person academic instruction, and that as a result of institutional closures, they no longer received the full benefit of those contracts.<sup>12</sup> Consequently, the students claim they are entitled to refunds of various fees and costs, including those for tuition, housing, meals, and other miscellaneous fees, such as those for student services, campus activities, recreation, health and wellness, libraries, counseling, technology, athletics, financial aid, transportation, parking, and other fees.<sup>13</sup>

For example, in nearly identical class action complaints filed against the University of Miami and Drexel University, students allege they are entitled to refunds because "[t]hrough the admission agreement and payment of tuition and fees, [the students] entered into a binding contract with [their institutions]."<sup>14</sup> Since social-distancing measures were implemented, students claim to have been deprived of the "on-campus experience" and "the benefits of on-campus learning."<sup>15</sup> They allege that the benefits of being on-campus and in-person academic instruction allegedly include, but are not limited to:

- face to face interaction with professors, mentors, and peers;
- access to facilities, such as computer labs, study rooms, libraries, and laboratories;
- student governance and student unions;
- extra-curricular activities, groups, intramurals;
- student art, culture and other activities;
- social development and independence;
- hands-on learning and experimentation; and
- networking and mentorship opportunities.<sup>16</sup>

Similarly, in other complaints filed against the University of Miami and Drexel University, students allege they "have been deprived of the opportunity for collaborative learning and in-person dialogue, feedback, and critique."<sup>17</sup> Some complaints include screenshots from marketing materials of statements that colleges and universities have made to recruit students to portray the importance institutions allegedly place on the on-campus experience.<sup>18</sup>

The students also claim unjust enrichment on the grounds that, through the payment of tuition and fees, they allegedly conferred a benefit to their respective institutions, which the institutions have retained without providing the services such benefit was premised upon.<sup>19</sup> In some cases, students also allege that their respective institutions have wrongfully converted fees that should be returned to students.<sup>20</sup>

In a few cases, such as the first action filed, students are not seeking reimbursement of tuition.<sup>21</sup> The complaint filed against the Arizona Board of Regents expressly recognizes that the "decision to transition to online classes and to request or encourage students to leave campus were responsible decisions to make."<sup>22</sup> The students seek refunds of room, board, and other 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.<sup>23</sup> In addition to the breach of contract, unjust enrichment, and conversion claims, the students contend that, while the Arizona Board of Regents offered



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housing and rent credits toward the next academic year, these credits are insufficient and not commensurate with their financial losses.<sup>24</sup>

## Strategies for Colleges and Universities

Numerous institutions have provided or will provide pro-rated refunds to students for unused housing or meal plans as a result of directing students to leave campus and closing the dorms.<sup>25</sup> However, colleges and universities have generally indicated that tuition will not be returned or reduced because students are still receiving instruction and curriculum in exchange for their tuition dollars. Although the method of delivery has shifted online, institutions are continuing to meet accreditation requirements and students are receiving the same opportunity to earn academic credit to satisfy their degree requirements.<sup>26</sup>

Additionally, 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 to ensure students can still obtain benefits they were receiving when physically present on campus.

For higher education institutions, the costs of delivering academic instruction and services have not necessarily changed despite shifting to online instruction as a result of the pandemic. In fact, in some cases costs have increased due to the associated expense of ramping up the required technology. Moreover, the underlying assumption of "unjust enrichment claims"—that institutions are saving money by being off campus—may be erroneous; some costs may have, in fact, increased, such as the costs associated with transitioning to and providing large-scale delivery of online courses and academic instruction (e.g., technology licenses and large-scale remote networks). Further, many institutions were mandated to close campuses by governmental order and/or to protect the safety of their communities to slow the spread of the virus. Therefore, while the loss of the on-campus experience is certainly a different experience, many institutions believe that they should not bear the burden of reimbursement, especially if they are meeting their obligations by continuing to provide academic instruction and services to students.

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## Tax Defense & Litigation



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Colleges and universities may have numerous defenses against these class action lawsuits. For example, to obtain class certification, the students must establish numerosity, commonality, typicality, and adequacy.<sup>27</sup> Institutions may have a challenge to class certification based on issues regarding the commonality and typicality of the class.<sup>28</sup> Many students are on academic, athletic, merit, and/or need based scholarships and would not be entitled to refunds under any circumstances. Other students have not fully paid their tuition for the semester. Institutions may want to determine whether these students are included in the class. Further, to have proper federal jurisdiction under the Class Action Fairness Act, the amount in controversy must exceed \$5 million.<sup>29</sup> Other arguments may be available depending on an institution’s jurisdiction and particularized circumstances.

An institution defending against these lawsuits should also assess whether it has possible defenses or relief from contractual obligations. Colleges and universities should consider reviewing agreements for any force majeure provisions. A force majeure is an event beyond the control of the parties that prevents contractual performance and may excuse performance without it constituting a breach.<sup>30</sup> Force majeure clauses provide a narrow defense on a contract-by-contract basis because each contract has different obligations that may be affected in varying ways and each jurisdiction has unique applicable laws.<sup>31</sup> Therefore, performance may only be excused if the force majeure clause includes the event, such as pandemics, epidemics or quarantines, preventing performance.<sup>32</sup>

In some jurisdictions, institutions may be able to assert impossibility of performance in response to breach of contract claims, particularly when there is no force majeure provision in the agreement.<sup>33</sup> Impossibility of performance is a defense that may be invoked

“when the destruction of the subject matter of the contract or means of performance makes performance objectively impossible” as a result of circumstances that could not have been anticipated.<sup>34</sup> The assumption that a global pandemic would not occur was likely an underlying assumption between students and their institutions. The pandemic arguably rendered the delivery of in-person classroom instruction, room and board, and other services impossible in many cases depending on the institution’s location.

Proactive Steps for Institutions

As the ramifications of the pandemic continue to emerge, institutions should consider taking proactive steps to minimize potential exposure. Colleges and universities should consider analyzing their existing contracts, marketing materials, and policies and/or make any changes, if necessary, as soon as practicable.

Depending on the circumstances and jurisdiction, courts have considered student handbooks, bulletins, catalogs, and admissions materials as contracts.<sup>35</sup> Institutions should consider reviewing institutional contracts and contract templates, including enrollment, tuition, and housing agreements, admissions agreements, room and board plans, handbooks, and marketing materials to determine what promises, if any, were made to current or prospective students, and also to determine whether such materials should be modified to include additional or revised protective clauses, such as force majeure, indemnification, consents, waivers, and/or early termination provisions.

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? Do residence hall agreements contain a force majeure provision that includes a pandemic or epidemic? Do waivers signed by students participating in study abroad programs

include acceptance of risk relating to a pandemic, including infection, travel restrictions, inability to return home, termination of educational programs, etc.? Institutions should also review any webpages that address or describe the cost of attendance, tuition, room, board, and other related fees.

Regardless of how courts decide the class action complaints, the potential impact of the pandemic on college and university campuses is significant—operationally, financially, legally and otherwise—and preparation is key. In this time of uncertainty, institutions that proactively assess defenses and mitigate risk will be better positioned to resiliently respond to today’s unprecedented challenges.

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32. *Id.* at 902–03; *see also Coastal Power Prod. Co. v. N.Y. State Pub. Serv. Comm’n*, 153 A.D.2d 235, 240 (3d Dept. 1990); *Macalloy Corp. v. Metallurg, Inc.*, 284 A.D.2d 227 (1st Dept. 2001) (both concluding that financial considerations and the fact that a contract becomes increasingly difficult and expensive to perform does not excuse performance under force majeure).  
33. *Id.* at 902; *see also Univ. of Minn. v. Agbo*, 176 Misc.2d 95, 96 (2d Dept. 1998) (note that impossibility of performance is not available as a defense to unjust enrichment claims).  
34. *Id.*  
35. *See, e.g., Keefe v. N.Y. Law Sch.*, 71 A.D.3d 569, 570 (1st Dept. 2010).

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*All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.*  
—*The Constitution of Japan, Article 14*

Of particular note, MacArthur’s Constitution redefines the legal status of women. The sole woman on the General’s staff was Beate Sirota, a twenty-two-year-old naturalized citizen who spoke fluent Japanese (a rare skill among Americans then) whose parents had lived in Japan during the war.<sup>12</sup>

Sirota was responsible for Article 14 which secures equality for all irrespective of gender and other suspect classifications. It does so in a manner above and beyond that expressed in the US Constitution.<sup>13</sup> Under MacArthur’s Constitution, women were given the vote. The first election after its adoption resulted in thirteen million women voting with 39 women being elected to the Diet.<sup>14</sup>

Even more telling, Sirota drafted a gender-specific provision that afforded women equal status in marriage, divorce, property rights and other spheres of domestic relations/family law. Article 24 enshrines the “individual dignity and essential equality of the sexes,” by establishing that marriage shall be “based only on mutual consent of both sexes and it shall be maintained through mutual cooperation with equal rights of husband and wife as a basis.”<sup>15</sup>

*Foremost of its provisions is that which, abolishing war as a sovereign right of the nation, forever renounces the threat or use of force as a means for settling disputes with any other nation and forbids in future the authorization of any army, navy, air force or*

*other war potential or assumption of rights of belligerency by the state.*

—*General MacArthur’s Announcement of March 2, 1946*

The most commented aspect of MacArthur’s Constitution is Article 9, wherein the Japanese “forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling disputes.”<sup>16</sup> The text goes on to prohibit the establishment of land, sea, and air forces. Although there are the Japanese Self Defense Forces (JSDF), the nation principally relies for its protection on the United States per the US-Japan Security Treaty of 1951.<sup>17</sup>

The sheer brutality of the Pacific War demanded that Japan be demilitarized so that it no longer threatened the peace. Japan also desperately needed to have its economy restored. Ironically, the Korean War assured the latter while Article 9 secured the former. MacArthur envisioned the United States as the preeminent power in the Pacific. Taking into account the necessities dictated by the emerging Cold War, the General needed to regenerate an economically vibrant, democratic Japan within the American orbit.

MacArthur’s Constitution achieved that and more. The text was, after some wrangling, accepted by Hirohito, grateful no doubt for having been spared. It was approved in the Diet by overwhelming numbers: 421 to 8 in the lower house and 298 to 2 in the upper chamber.<sup>18</sup> The document was then affirmed by large majorities in a public referendum, taking effect on May 3, 1947, an anniversary celebrated annually as Kenpo Kenenbi (Constitution Day).<sup>19</sup>

*The people themselves control their own constitution and are, in the final analysis, the sovereigns of their own land. One of the most interesting things about the Japanese constitu-*

*tion as adopted in 1946 is the fact that it has never been amended, although it has been in force for seventeen years. This speaks well for the wisdom and the judiciousness that went into its final draft.*

—*General MacArthur, Reminiscences*

Nearly three-quarters of a century later, MacArthur’s Constitution remains in full force and effect without a single word being altered. By contrast, the American Constitution has been amended twenty-seven times since its adoption in 1787. More to the point, the Constitution of the French Fifth Republic has been amended ten times since it was first proposed by General De Gaulle in 1958.<sup>20</sup>

This is not to say that there has not been agitation for revision of the text, notably Article 9, due to the provocations of the North Koreans. Shinzo Abe, the current Prime Minister, has made Constitutional revision an issue, but he has yet to act on it.<sup>21</sup> That being said, MacArthur’s Constitution serves as more than the charter of government for one of the great nations of the world.

It is and will forever be a lasting testament to Japan’s finest Shogun and the most outstanding soldier/statesman the United States military ever produced. The final word on MacArthur’s achievement belongs the Shigeru Yoshida, Japan’s great post-war leader, who succinctly summed up the General’s sublime peacetime triumph:

The accomplishments of General MacArthur in the interest of our country are one of the marvels of history. It is he who has salvaged our nation from post-surrender confusion and prostration, and steered the country on the road to recovery and reconstruction. It is he who has firmly planted democracy in all segments of our society. It is

he who paved the way for a peace settlement. No wonder he is looked upon by all our people with the profoundest veneration and affection.<sup>22</sup>

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