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COVID-19 and University Closures

What Institutions Can Expect as Students File Class Actions Against Them

By Eric Samore, Ronald Balfour, and Michael Chang



Colleges and universities across the nation have been forced by the COVID-19 pandemic to close their physical classroom doors and open up virtual ones. While these schools are trying to make the best of a bad situation, students are filing class actions in droves and sending a clear message: having paid for the full campus experience, they feel short-changed by the transition to remote learning.[1] Colleges and universities must be prepared to defend themselves by challenging both the merits of these suits and the propriety of class certification.

The Benefit of the Bargain

Generally speaking, students suing their schools based on their COVID-19 response allege they were deprived of the benefit of their bargain with schools—paying tuition and fees, and then losing the benefits of in-class learning, on-campus housing, events and activities, and other facilities and services, such as gyms, libraries, and student health centers. These students are typically seeking pro-rated refunds of the portion of tuition, on-campus housing, and meals attributable to the part of the academic year that was shifted to a remote setting. They also frequently seek injunctive relief to prevent schools from retaining unused funds.

Past experience suggests that, now that the class action plaintiffs' bar has hit on a possible theory of liability against colleges or universities, they will assert that theory against as many schools as possible—regardless of the strength of a particular claim against a particular school. As a result, any college or university that had to transition to remote learning because of the pandemic can reasonably expect a suit for monies paid for the Spring 2020 term.

In Defense of the Institutions

Whether by state stay-at-home or shelter-in-place orders, based on guidance from the Centers for Disease Control[2] or by their own volition, colleges and universities had little choice but to close their doors to protect their students, faculty, and staff. The students bringing these suits have not argued otherwise; to the contrary, students from New York to California have expressly admitted in their pleadings that schools acted appropriately in closing physical campuses.[3] Accordingly, institutions cannot defend themselves by simply saying they did the right thing—plaintiffs bringing these suits already concede as much and account for that in their legal theories. Instead, successfully defending these suits will require less moralizing and more legal nuance.

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[1] *See, e.g., Satam v. Northeastern University*, Case No. 20-cv-10915 (D. Mass. May 13, 2020); *Shoham v. Loyola Marymound University*, Case No. 20-cv-04329 (C.D. Cal. May 13, 2020); *Soriano v. University of New Haven*, Case No. 20-cv-00662 (D. Conn. May 13, 2020); *Student A v. Wagner College*, Case No. 20-cv-02170 (E.D.N.Y. May 13, 2020).

[2] Interim Guidance for Administrators of U.S. Institutions of Higher Education, Centers for Disease Control and Prevention (rev. Mar. 18, 2020), *available at* https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-administrators-college-higher-education.pdf (suggesting Institutions consider "extended in-person class suspension" when there is substantial community transmission—"[i]n collaboration with local public health officials").

[3] *See, e.g., Student A v. The Board of Trustees of Columbia University in the City of New York*, Case No. 20-cv-03208, Dkt. 1 at ¶ 2 (S.D.N.Y. Apr. 23, 2020) ("closing campus and transitioning to online classes was the right thing"); *Brandmeyer v. The Regents of the University of California*, Case No. 20-cv-2886, Dkt. 1 at ¶ 5 (N.D. Cal. Apr. 27, 2020) ("University of California's decision to transition to online classes and to instruct students to leave campus were reasonable decisions to make").

The Pleadings

The first opportunity to attack the legal sufficiency of these lawsuits comes right at the beginning, at the pleading stage. Some schools have successfully defeated claims by pointing out they did not make any *specific* promises they did not keep, meaning there is no breach of contract—these students' general expectations were not sufficient in and of themselves to support their claims.[4] Other schools have successfully moved to dismiss based on defenses such as sovereign immunity.[5]

Summary Judgment

Students whose cases survive the motion to dismiss stage may nevertheless see their claims succumb to summary judgment. At this point, cases about COVID-19 are too new to have reached the summary judgment stage, but it is not difficult to imagine how this might play out. For example, if students tether their contract claims to a warranty that the school put out in advertising materials or handbook, the school might be able to show that the advertisement was not part of the basis of its bargain with the student because the student never saw it or did not make any attendance decision based on it, or based on disclaimer language in the material.[6] Other possible motions for summary judgment could present themselves as well; defending against these novel claims will require analyzing the specific facts alleged to evaluate the soft spot in them.

Class Certification

A denial of class certification is often the "death knell"[7] of the litigation. Predominance is usually the critical battleground when opposing certification under Fed. R. Civ. P. 23(b)(3), and these cases are likely to be no different: just because the named plaintiff has a claim to have been shortchanged doesn't necessarily mean everyone else does, and determining whether each putative class member does may involve individualized inquiries that preclude class certification. The predominance requirement provides that "questions of law or fact common to class members predominate over any questions affecting only individual members[.]" Fed. R. Civ. P. 23(b)(3). When approaching these inquiries, there are critical questions that should be addressed:

- Can injury and damages be proven on a class-wide basis given the diverse composition of a student body (*e.g.*, scholarships, student-aid, part-time students, students enrolled in online programs, advertising material actually seen by each student, etc.)?[8]
- The students are bringing common law causes of action (*i.e.*, seeking to assert breach of contract or unjust enrichment claims on behalf of a nationwide class), but do variations in state law preclude certification under the court's choice of law jurisprudence?[9]
- Are there individualized defenses that can be asserted against class members?[10]

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4 *See Gokool v. Oklahoma City Univ.*, No. CIV-16-807-R, 2016 WL 10520949, at *4 (W.D. Okla. Dec. 29, 2016) (dismissing breach of contract claim because student could not "identify [a] specific service that [the university] agreed to provide her but failed to," instead relying on "broad, policy-driven statements"); *Krebs v. Charlotte Sch. of Law, LLC*, No. 3:17-CV-00190-GCM, 2017 WL 3880667, at *5 (W.D.N.C. Sept. 5, 2017) (dismissing breach of contract claim where the students "do not identify any written contract and provide no meaningful substance (or even the date) of any such alleged agreement.").

5 *See, e.g., Leatherwood v. Prairie View A & M Univ.*, No. 01-02-01334-CV, 2004 WL 253275, at *2 (Tex. App. Feb. 12, 2004) ("The University is a state agency entitled to sovereign immunity.").

6 *See, e.g., Moeller v. Bd. of Trustees of Indiana Univ.*, No. 116CV00446JMSMPB, 2017 WL 6603718, at *17 (S.D. Ind. Dec. 27, 2017) (granting defendant's motion for summary judgment, in part, where basis of claim for breach of contract was a university handbook that stated "Statements and policies in this Handbook do not create a contract and do not create any legal rights ...."); *Packer v. Trustees of Indiana Univ. Sch. of Med.*, 73 F. Supp. 3d 1030, 1041 (S.D. Ind. 2014) ("Because the Academic Handbook explicitly disclaims any creation of a contract, Dr. Packer cannot rely upon these policies as a basis for her breach of contract claim.").

7 *Microsoft Corp v. Baker*, 137 S.Ct. 1702, 1707 (2017).

8 *See Robb v. Lock Haven Univ. of Pennsylvania*, No. 4:17-CV-00964, 2019 WL 2005636, at *12 (M.D. Pa. May 7, 2019) (denying class certification where the named plaintiffs' claims "involve[d] circumstances that are different than some of the individuals in the proposed class," as the class was comprised of a "nebulous bunch [that] . . . might not have a [claim.]").

9 *See Payne v. FujiFilm U.S.A., Inc.*, No. CIV. A. 07-385 GEB, 2010 WL 2342388, at *10 (D.N.J. May 28, 2010) (denying class certification where choice of law analysis revealed, in part, state laws regarding breach of contract "var[ied] greatly with respect to issues such as statutes of limitations, parol evidence, burdens of proof, reliance, and privity," and the plaintiffs had failed to satisfy their burden on certification.); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 371 (E.D. La. 1997) (finding plaintiffs had not carried their burden to provide a solution to address "variations among the fifty-one relevant jurisdictions' . . . breach of contract causes").

10 *See State of W. Virginia ex rel. Miller v. Sec'y of Educ. of U.S.*, No. CIV. A. 2:90-0590, 1993 WL 545730, at *14 (S.D.W. Va.

Defendants that develop and marshal individualized evidence of their defenses will be well positioned to defeat class certification.[11]

Conclusion

While courts have begun providing opinions that lay the framework for a potential motion to dismiss, the landscape for cases that survive those motions remains uncharted territory at this point. As time goes on and courts begin ruling on motions for summary judgment and class certification, those rulings will provide some clarity as to which defenses are most likely to succeed. In the meantime, schools must be prepared to defend themselves in a wide variety of manners, including those listed above if they are supported by the facts of the case. Successful schools will be those who have been careful to create a factual record in support of their merits and certification defenses.

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Sept. 30, 1993) (denying students class certification because of the "unique defenses to which the individual claims of the named plaintiffs are subject to").

[11] See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) ("[A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.").