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Practice Update

# Higher Education Braces for Class Action Lawsuits for COVID-19-Related Reimbursements

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As most institutions of higher education have transitioned to online learning, several class action lawsuits have been brought against such institutions, seeking reimbursement of tuition and certain fees. Though the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), as referenced in a previous Akerman Practice Update, allocated more than $6 billion to higher education institutions to provide emergency grants to students for COVID-19 related expenses, aggrieved students feel that more is indeed owed, as evidenced by the cases explained below.

In nearly analogous class action complaints filed in the U.S. District Court for the District of South Carolina, plaintiffs in two separate class action complaints brought suit against their respective universities alleging both (a) breach of contract, and (b) unjust enrichment. In both complaints, plaintiffs allege that "through admission agreement and payment of tuition and fees" plaintiffs entered into a binding agreement with their respective universities for various services and experiences which they have been deprived of due to their campuses' closing. Moreover, plaintiffs premise their unjust enrichment allegation on their conferring a benefit to their universities (tuition and fees), which their universities have retained without providing the services such benefit was premised upon.

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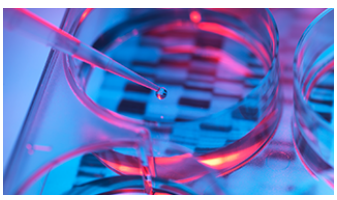

Notably, both complaints acknowledge an argument that many institutions have made with regard to not refunding tuition payments. To date, numerous institutions have refused to issue tuition refunds because academic instruction is still being delivered, albeit, via an online format. In rebutting this argument, both complaints state:

> "Although Defendant is still offering some level of academic instruction via online classes, Plaintiff and members of the proposed Class have been and will be deprived of the benefits of on campus learning as set forth more fully above. Moreover, 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."

A third class action complaint, filed by the same plaintiffs' counsel in the above mentioned South Carolina cases (along with local Colorado counsel), was filed in the U.S. District Court for the District of Colorado, alleging breach of contract and unjust enrichment. The complaint and allegations in the Colorado case are nearly analogous to those in the above mentioned South Carolina cases, except for (a) the plaintiff student's father, who paid "all or a portion" of his student daughter's tuition and fees, is also a named plaintiff, (b) the action is being brought against the university through its Board of Regents, and (c) the class plaintiffs are further delineated into two (2) distinct classes based upon the unreimbursed fee paid by the student (e.g. the Tuition Class, and the Fee Class).

Another class action complaint against a university was filed in the U.S. District Court for the Northern District of Indiana, which similarly alleges both (a) breach of contract and (b) unjust enrichment, but (1) also names the Board of Trustees of the university as a defendant, and (2) further delineates plaintiffs into four (4) distinct classes based upon the unreimbursed fee paid by the student (e.g. the Tuition Class, the On-Campus Housing Class, the

Meals Class, and the Fee Class). Similar to the aforementioned cases, this Indiana case also highlights the argument numerous institutions have made for not refunding tuition, stating that plaintiffs were "... deprived of the value of the services the tuition was intended to cover – live in-person instruction in brick and mortar classrooms... " Plaintiffs thus argue that they are entitled to "... the difference between the 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."

In the U.S. District Court for the District of Arizona, another class action complaint was recently filed against Arizona's higher education governing body on behalf of various Arizona public higher education institutions. Similar to the cases above, plaintiffs here allege both (a) breach of contract and (b) unjust enrichment, but also add an allegation of (c) conversion. Unlike the above mentioned cases, Plaintiffs in this Arizona case are not seeking reimbursement of tuition, and even acknowledge that moving instruction to an online format was an appropriate decision ("[the higher education governing body's] decision to transition to online classes and to request or encourage students to leave campus were responsible decisions to make... "). Thus, plaintiffs here are seeking to only be reimbursed the cost of room and board, and any fees paid.

As higher education institutions across the nation begin to anticipate similar class action suits, below are some issues and defenses which institutions may consider asserting, depending on their jurisdiction and particularized circumstances.

## Class Certification and Other Jurisdictional Matters

As an initial matter, institutions should begin by evaluating whether class certification is proper should any class action suit be brought. Where

plaintiffs bring action on behalf of all enrolled students during the semester interrupted by COVID-19, issues as to commonality and typicality of the class may be raised, specifically where "all enrolled students" includes students with substantially differing academic standings (e.g. freshmen v. seniors).

In this same vein, institutions should also explore whether all necessary and indispensable parties have been joined in the lawsuits. The South Carolina cases only name their respective universities as defendants, and the Indiana case names its respective university, and its board of trustees. In many cases, institutions have halted live instruction and campus access due to an executive order issued from the state they are in. As such, an issue that must be explored, at least as an initial matter, is whether the bodies issuing the executive orders to which the institutions are complying with must be joined as well.

Finally, as all cases brought thus far have alleged proper jurisdiction under the Class Action Fairness Act (28 USC 1332(d)) (the Act), institutions, and particularly smaller institutions, should ensure the jurisdictional requirements of the Act have been satisfied. Amongst other things, the Act requires that the amount in controversy exceed $5,000,000.00. Accordingly, smaller intuitions should ensure that any alleged amount in controversy (e.g. tuition and fees) brought under the Act actually exceeds this threshold amount.

## Force Majeure

Institutions should evaluate any enrollment agreements, or analogous documents, for any force majeure provisions contained therein. Generally, force majeure provisions contain a list of events which will qualify as a force majeure event, thus excusing performance of certain contractual provisions. For example, some force majeure provisions expressly qualify "epidemics or

pandemics" or "quarantines" as force majeure qualifying events, which may be applicable with current circumstances.

## Impossibility of Performance

Certain jurisdictions recognize impossibility of performance as a defense to breach of contract, notably where there is no express force majeure provision between the parties. Under this theory, a party raising this defense must show that an unanticipated circumstance has made performance of the obligation vitally different from what should have reasonably been contemplated by the contracting parties. This defense may also potentially be raised in circumstances where a regulation or government order renders performance impossible (e.g. executive orders halting non-essential businesses).

## Materiality of Breach

Certain jurisdictions recognize that only a *material* breach of a contract's terms serves to excuse the other party from its own duty of counter-performance (e.g. payment of tuition). The analysis as to whether a breach constitutes a "material" breach is fact intensive, and must be analyzed through the applicable "materiality" case law of the relevant jurisdiction. For example, the analysis in Illinois involves "...an inquiry into such matters as whether the breach worked to defeat the bargained-for objective of the parties or caused disproportionate prejudice to the non-breaching party, whether custom and usage considers such a breach to be material, and whether the allowance of reciprocal non-performance by the non-breach party will result in his accrual of an unfair advantage." *Sahadi v. Continental Ill. Nat'l Bank & Trust Co.*, 706 F.2d 193, 196 (7th Cir.1983).

Under this theory, accordingly, institutions may be able to posit that because the "bargained for objective" (delivery of instruction), though altered, is not truly defeated, there has been no *material* breach

of the contract's terms, thus, not excusing the counter-performance of the student (e.g. payment of tuition).

In addition to the issues and defenses raised above, it must be reiterated that additional arguments may be available dependent on an institution's jurisdiction and particularized circumstances.

As the repercussions of the COVID-19 pandemic continue to unfold throughout the higher education industry, new complaints are being filed ever more frequently. Akerman's Higher Education and Collegiate Athletics Practice will stay abreast of these class action suits, and will provide updates to these cases, and any additional cases filed, as they arise. In the interim, Akerman is here to answer and address any questions or concerns your institution may have with regard to these particular suits, or your institutions particular circumstances.

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