



Colleges Face More COVID 19– Related Damage: Student Class Actions Seeking Refunds

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A Wave of Class Action Litigation

Along with other novel and difficult COVID 19–related issues facing colleges in 2020, these institutions now face an ever–increasing wave of class action litigation by students seeking a return of tuition, room and board, and other fees paid. More than 100 class action lawsuits have been filed in at least 22 states against all types of colleges and universities: public and private, state flagship institutions, smaller liberal arts colleges, regional institutions, and others. Schools that have already provided partial refunds are not immune, as students argue that the refunds do not compensate for alleged damages. And these class action suits are likely to keep coming until colleges prove they can be successfully defended.

The suits allege that online instruction does not provide the same benefit for which students originally paid. The suits so far have all been similar, with claims for breach of contract, unjust enrichment, and conversion. Complaints mention several types of on–campus services and experiences that students may not have received during part of the spring semester: access to libraries, laboratories, computer labs, recreational facilities, and health services; participation in clubs, extracurricular activities, and intramural sports; networking and mentoring opportunities; and social experiences. Most directly allege that an online education is not as valuable as in–person classroom instruction. Some even allege that the value of a degree – based, at least in part, on online classes – has been diminished. While there are many strong defenses that schools can and should vigorously pursue, the financial and other consequences of any court agreeing with students on these issues is a risk that must be considered.

How Can You Prepare Now to Handle These Suits?

Because each case will likely be heavily based on the specifics of that institution's policies and procedures, each case will involve different considerations. But there are some common steps that every college should be considering now to prepare for the likely filing of this type of suit.

1. Work with counsel to review all policies, procedures, and public facing documents that may be considered to establish a contractual relationship with students.

- Identify any statements that could be alleged to be a misrepresentation, as well as any statements that preserve the university's right to modify the instructional format.
- Analyze documents that include any enrollment agreement, housing or meal plan contract, and written refund policy.
- Determine whether there is a force majeure clause – and if that language be interpreted to cover COVID 19–related circumstances.
- Determine where the contractual documents contain dispute resolution procedures or even class action waivers.
- Consider how your school promotes the benefits of enrollment and campus life to prospective students. This would include brochures, catalogs, course descriptions, and social media posts.

2. Document the changes to university procedures and instructional formats that are occurring, why those changes are being made, and the risk involved in any alternatives.

- Document the chronology of recommendations by governmental officials and accreditation bodies and how the school responded.
- Employees should be encouraged to document the rationale for instructional changes made in response to COVID-19.

3. Identify the economic and other factors that are the basis for current charges for tuition, room and board, and student fees. That analysis may help identify additional issues to defend any challenge to those items.

4. Begin to prepare your school's general litigation strategy for these cases.

- Maintain any appropriate privileges by involving counsel in discussions and decisions.
- How aggressive is the university willing to be? Ongoing relationships with students and alumni may mean competing objectives.
- Be aware of the impact on the public narrative in any statements related to these issues.

5. Be mindful of antitrust concerns.

- Avoid discussions and agreements with competitor institutions about future plans that could lead to accusations of antitrust misconduct.
- Make decisions independently.

How Do You Defend These Cases When Filed?

Once a suit has been filed, the engagement of counsel experienced with class action litigation is imperative. While some defenses may be available before class certification, a key part of any class action litigation focuses on the battle over whether a class should be certified. To certify a class of students, a plaintiff will typically need to show: (1) the class is so numerous that individual suits are impractical; (2) the students' cases involve common questions of law and fact; (3) the individual plaintiff's claims are typical of other class members and that they can fairly represent the class; and (4) that common questions predominate over individual issues. In these suits, there are several bases on which class certification should be opposed:

- How is the proposed class defined? Is it too broad? Is it too narrow?
- Do any of the school's documents include a class action waiver or arbitration clause that would bar a class action?
- How does the CARES Act's relief impact the ability to assert common financial harm?

- How do differences in the circumstances of each student impact the requirements for commonality, typicality, and predominance: differences among educational courses and majors; requirements of in-person labs or practicals; how much they used university facilities; in person class attendance; and different levels of financial aid?

Beyond opposing class certification, colleges and universities will often have many other strong defenses to the merits of students' claims. Defenses will be fact-specific based on the circumstances of each institution and the students that file suit, and may include:

- What is your jurisdiction's view of the educational malpractice doctrine? Many jurisdictions reject all tort liability for allegations of inferior instruction. The reasons for this rule include: (1) lack of a satisfactory standard of care by which to measure an educator's conduct; (2) inherent uncertainty in determining the cause of any damages; (3) the need to avoid an ensuing flood of litigation; and (4) the desire to avoid having courts interfere with the internal operations and daily workings of an educational institution.
- Are any claims against public universities barred by governmental immunity?
- Is there a contractual relationship with students? What documents will a court consider to provide the terms of that relationship?
- Are there force majeure clauses or arbitration provisions that will impact the litigation?
- Will the doctrines of contractual impossibility and frustration of purpose defeat the breach of contract claims?
- Does the complaint sufficiently allege specific violations of contractual provisions?
- Was there any breach of contract at all because there is no obligation to provide in-person instruction?
- Was there a material breach of any obligations? Or did the university substantially comply with all obligations?

- Can an unjust enrichment or conversion claim be dismissed based on similar arguments for a breach of contract?
- Does the individual plaintiff have standing? Did they pay for their own education? Did they take advantage of the allegedly missing facilities and services?

Next Steps

As colleges and universities continue to face challenges imposed by COVID 19–related circumstances, schools must also prepare for the coming wave of refund class action lawsuits. The question is likely when, not if, will this type of suit be filed. The first step is to work with counsel to understand the risks and the case that can be asserted against your school. You should then begin working with experienced counsel to develop these defenses in the context of your institution.

Frost Brown Todd is monitoring these cases. Our attorneys experienced in complex and class action litigation stand ready to assist with any questions you may have. For additional information, please contact [Griffin Terry Sumner](#) or any member of Frost Brown Todd's [Coronavirus Response Team](#).

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a [Coronavirus Response Team](#). Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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