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WHAT DOES COLLEGE TUITION PAY FOR? PANDEMIC-RELATED COLLEGE REFUND CLASS ACTIONS MAY PROVIDE ANSWERS

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When COVID-19 arrived in the United States during the spring academic semester, there were approximately 20 million students enrolled in on-campus classes at U.S. colleges and universities. The virus rapidly spread. The media described hordes of college students vacationing together during Spring Break despite CDC recommendations to social distance. Soon state and local governments began issuing shelter-in-place or stay-at-home orders. Beginning in March, higher education institutions across the country made the unprecedented decision to close their campuses while classes remained in session. Universities and colleges canceled graduation ceremonies. As a matter of public safety, universities instructed millions of students to vacate campus housing and return home. At the same time these colleges hit pause on the "full collegiate experience," their educational mission persisted. Colleges sprinted to switch ongoing classes to online and other remote learning formats for their students to avoid a lost semester, trimester, or quarter.

Now that the dust has begun to settle, students have responded by filing a flurry of putative class action lawsuits, contending that they no longer receive the benefit of their bargain through remote learning. Thus, a deceivingly simple – and largely overlooked – question about the U.S. educational system has surfaced: What exactly does tuition pay for? The answer to this question will not only drive the resolution of these cases on the merits, but also determine whether students will be able to obtain class action status to pursue these claims.

There are now dozens of lawsuits involving students' dissatisfaction with the new academic environment developed in the midst of the pandemic. The lawsuits challenge primarily tuition payments as well as a variety of other mandatory fees that an academic institution might assess, such as room and board and fees for meal plans, student activities, student government, facilities, technology (e.g., science labs), student health plans, and parking. It appears that some colleges have already taken action to address some of the non-tuition items, issuing refunds or credit for portions of these fees. Still, some students remain unsatisfied, arguing that anything short of pro rata reimbursement is insufficient. We expect the claims regarding miscellaneous "fees" to follow a predictable class action trajectory. That trajectory includes disputes over whether these fees can

properly be considered "divisible" on a pro rata basis, or whether certain carrying costs justify a less-than-pro-rata refund.

The more complex issue involves students' position over the bargained-for purpose of tuition. Tuition payments also dwarf the other miscellaneous fees by at least one order of magnitude, making tuition the most valuable target for plaintiffs and their attorneys. In a nutshell, student-plaintiffs have adopted the position that the purpose of tuition is not one-dimensional, focused solely on fulfilling degree requirements. That is, a tuition payment stands as consideration for a wide array of university commitments much broader than the right to attend classes that, if passed, will count as credits toward the student's graduation with a bachelor's (or other) degree.

As many of the lawsuits allege, colleges actively market themselves to incoming freshmen and transfer students by touting the full "experience" offered by campus life. Websites, recruiting events, and brochures paint a carefully curated portrait of a unique campus lifestyle that attempts to set each institution apart from its peers. As a result, students argue that they consider a variety of factors when they select which college they will attend (or whether they will attend at all). In deciding which institution to attend (and pay varying levels of tuition), students may consider some or all of the following:

- The general "social" development associated with leaving home and attending college;
- Prestige of the institution (name brand recognition/value);
- Social life (e.g., Greek system);
- Accessibility of, and personal interaction with, professors;
- General access to campus amenities (e.g., libraries, gyms, greenspace);
- Quality of life issues (e.g., extracurricular activities, campus programming, sporting events);
- Quality and proximity of student housing facilities;
- Networking with other students;
- Networking with alumni; and
- Career prospects, whether from on-campus recruiting or other sources.

These lawsuits assert that, even before the pandemic, online-only learning was already available as an option for college students, primarily through for-profit institutions. These students made the decision to attend institutions that offered an in-person, on-campus experience, often at a significantly higher tuition cost, instead of working toward a degree online.

These new lawsuits frequently raise legal claims for breach of contract, unjust enrichment, and conversion. In essence, the students allege that they have already paid their tuition, expecting to receive some or all of these aspects of the "college experience," but the college has now retained the full payment without providing students the "full" benefit of the bargain. To date, the lawsuits generally do not allege tort theories, possibly because of sovereign immunity issues against state institutions, and possibly because it is difficult to argue that the college committed a culpable "bait and switch" when the cause is an unforeseen pandemic coupled with emergency orders that effectively outlaw in-person learning.

These lawsuits raise the inconsistent theories of breach of contract and unjust enrichment perhaps because it appears unclear whether a breach of contract claim exists at all. In the complaints, the student-plaintiffs struggle to identify express contractual language regarding the scope of services offered by colleges in return for a tuition payment. Although colleges may require students to adhere to student handbooks and policies, these handbooks and policies do not follow the traditional contractual paradigm of making explicit promises to students as consideration for their tuition payments. While circumstances may vary for individual collegiate institutions, and a very few non-profit institutions may require students to execute "enrollment agreements" with their students, there is typically no fully integrated contract between the student and the institution regarding tuition payments and the services provided therefor. Such contracts are most often not provided as part of the admissions package or in other materials furnished before the beginning of a student's first semester. Many colleges and universities require students and guarantors (e.g., parents) sign financial responsibility agreements acknowledging the obligation to pay tuition, but those agreements typically are silent about the institution's obligations in return. Nevertheless, even in the absence of express contracts, student-plaintiffs may manage to survive motions to dismiss because of liberal pleading standards that could require courts to assume for the sake of argument that such contracts exist.

Based on a review of publicly available agreements, colleges have a variety of different contracts with students (or parents) beyond handbooks, including financial aid and scholarship agreements and housing contracts. It appears, however, that many of these contracts were not drafted with an event like the COVID-19 pandemic in mind, in terms of including disclaimers and waivers that might protect the institutions. These agreements also are unlikely to address the "academic experience" that students now contend was a central part of the tuition bargain.

Another hurdle students may face is standing to sue. Many students don't actually pay for college out of their own pockets. Their parents do. Some students may also receive full or partial financial aid, scholarships, or grants. If the student-plaintiff has not paid anything out of pocket, he or she arguably has not suffered any damage or loss, the institution has not been unjustly enriched at the expense of the student, and the institution has not possibly converted any of the student's property. Parents paying for their child's college might have to be added as named plaintiffs to some of the lawsuits, and/or included in the class definitions, to cure this problem.

If the breach of contract claims survive, and students can satisfy a court that a contractual relationship exists, the students' claims may still be barred or limited by traditional contract defenses such as force majeure, frustration of performance, or impossibility of performance. Courts may also consider the universities' response to the pandemic, including providing online classes for the remainder of the current academic period, to qualify as substantial performance of the university's obligations in return for tuition payment. Individual contracts – assuming they exist – may also present unique defenses. The colleges' core defenses may not be addressed until later stages of litigation.

In the absence of express contracts, unjust enrichment claims serve as another vehicle for students to pursue their monetary claims against colleges. Unjust enrichment claims, however, are notoriously difficult to certify as class actions. As a result, student-plaintiffs whose claims survive a motion to dismiss can expect far more substantial hurdles at the class certification phase. At their core, these cases regarding the deprivation of the full "college experience" suffer from one of the basic flaws that dooms many putative class actions: the more multifaceted the analysis, the greater likelihood that individualized issues will overwhelm class-wide issues and make class treatment inappropriate.

Indeed, even analyzing just the classroom experience raises a host of individualized issues that demonstrate why class treatment of the claims would be inappropriate, including with regard to whether any particular student did not receive the benefit of his or her bargain for tuition. They also demonstrate how difficult, if not impossible, it may be to construct a uniform damages model for the entire class.

Most colleges offer a wide variety of majors and degree programs. The nature and format of classes in one academic major may differ dramatically from the nature and format of classes in another major. A mathematics major is likely to have a substantially different academic format than, for example, a drama major. The differences among pre-COVID-19 classes present individualized issues. For students enrolled in a course involving human subject research, or a course of study involving many lab hours per week, or an acting or dance class, the drawbacks of distance learning are clear: students may lack access to materials, subjects, and equipment, or the ability to interact with other students in the manner that forms the educational experience. On the other hand, a large history or mathematics lecture class does not typically involve access to specialized materials or an unusual level of personal interactions with other students. To further complicate the analysis, even students studying the same major may take vastly different elective courses.

Where the differences between in-person and online learning are substantial, the arguable damages may increase, but the likelihood of class certification correspondingly decreases because the students' experiences are so personalized. At the same time, when the differences between in-person and online learning are *insubstantial*, the likelihood of class certification arguably increases, but any potential damages diminish rapidly. Simply put, students take a broad range of courses,

making it even more difficult to figure out a meaningful uniform damages model across an entire student body. This spectrum of variation may be so wide that, even if a damages model could be applied, the sheer number of subclasses that would have to be created to group together similarly situated class members would make class treatment unmanageable.

Every aspect of the "college experience" appears so personalized that it is difficult to conceive of a method in which every dimension of that experience can be replicated in a uniform fashion across a class action. For example, one of the chief complaints from students right now is reduced access to professors. Many students, however, are typically enrolled in large lecture-style classes with hundreds of other students and minimal or no interaction with professors during the class. In addition, many students never take advantage of office hours. As a result, any arguable differences between "normal" learning and remote learning is marginal at best. Other students enrolled in small seminars, and who visit professors frequently, have a distinctly different experience. Even within the "online" platform, these students may have different experiences, as certain professors may host live classes and allow questions, while other professors pre-record their lectures. Still other departments and even individual professors elected to offer additional course content and educational opportunities, such as additional virtual chat sessions and expanded virtual office hours. At a minimum, it appears that courts will have to examine every student's coursework throughout the semester across hundreds or thousands of class options, and then cross-reference that coursework with the individual student's learning style, utilization of faculty engagement opportunities, and so forth. This is an inherently individualized, time-consuming, and burdensome inquiry.

As another example, students point to issues like the lack of access to campus facilities, extracurricular activities, and campus programming (e.g., guest speakers, sporting events). Students participate in these activities in varying degrees. Some students find themselves deeply involved in student government or clubs, while others will never approach these activities in favor of other ways of socializing. Some students will never attend a sporting event; others will attend every home and away game for their favorite sport. Some students may use the library every night. Others may use the library once a semester to study for exams, or never. These lawsuits ask for a price tag to be placed on the "college experience," but courts will almost certainly find it difficult – or more likely, impossible – to determine on a class-wide basis how each student has been deprived of the benefit of his or her bargain when students inherently do not take advantage of all (or even most) of the benefits made available to them. If a student has never set foot in the library for seven semesters, the college can hardly be "unjustly" enriched when the student never enters the library during the final semester either.

The extent to which a student receives financial aid, scholarship and/or grant monies also arguably raises individualized issues that impact class treatment. How has a scholarship athlete been damaged at all when he or she does not pay for tuition? For spring sports athletes, the NCAA has also provided those students with another year of eligibility in their sport. For non-athletes, how has

a student receiving 50% financial aid been injured, as compared to a student paying full tuition? Is a partial "academic" scholarship meant to defray tuition with respect to these experiential issues, like Greek life? It is difficult to envision a damages model that accounts for the myriad financial scenarios presented by individual putative class members.

Individual issues also may exist pertaining to particular defenses available to the institution. For instance, there are reports that student cheating has become much more common after the conversion of classes to the online format. Cheating typically is a violation of the university's honor code and typically is punishable by academic probation, suspension, or expulsion. It arguably would be considered a breach of any contract alleged by the student-plaintiffs, which might preclude a recovery by the cheating student. Further, under most colleges' financial responsibility agreements and/or tuition refund policies, a student guilty of cheating would not be entitled to a refund of tuition. These individual issues may make class certification inappropriate.

Plaintiffs' counsel likely will hire experts to construct one or more surveys to identify the different fundamental elements of the "benefit of the bargain" of an on-campus education, and measure the diminution of value of these various elements, based on which they will hypothesize a damages model applicable to the class. A key issue will then be if, given the widespread effect of the pandemic, any such survey can be unbiased. One of the other problems with reliance on such survey data will be how that data compares with student satisfaction surveys conducted before the pandemic. Further, disaggregating the student experience into its component parts will likely show that students value most highly the relationships they establish in the residence halls, fraternities and sororities, sports teams, clubs, etc. While there may be a loss to students of that part of the purported value proposition, how will the experts account for the value of those relationships online, and the durability of those relationships, as well as the value of other relationships students have been able to establish or re-establish during the pandemic?

Whether or not COVID-19 continues through the fall semester, one can expect colleges to begin taking precautionary measure. Beginning next semester, colleges and universities may begin to present incoming students with a fully-integrated contract setting forth clear expectations for the services associated with tuition. The contractual consideration offered by colleges in exchange for tuition may or may not agree with the student-plaintiffs' own conception of what they are paying for. For example, these contracts may promise only that the college will make available the class options necessary for students to fulfill their degree requirements, without making any further promises about the classroom or campus "experience." These contracts may carve out various "intangibles" about campus life, so that students cannot bring future claims against colleges and universities under this breach of contract theory. In addition, the existence of these contracts may bar the availability of unjust enrichment claims in certain jurisdictions in which unjust enrichments claims cannot be pursued in light of an express, fully integrated contract.

Colleges may also begin tweaking their marketing materials, whether online or in paper form. Although it seems unlikely that colleges will cease touting the benefits of campus life, there may be

a slight shift in focus or at least terminology. Although some websites currently contain disclaimers, colleges may also begin including more fulsome disclaimers in their marketing materials to ward off misrepresentation claims, especially when the academic landscape remains unpredictable.

Throughout this process, colleges would be well-advised to be careful about the documents they create as they make these decisions, whether in terms of email traffic or internal, non-privileged memoranda. These documents, if obtained in discovery, may serve as fodder for students and their attorneys as they continue to pursue litigation over the coming months and years.

In conclusion, although colleges took swift action in response to COVID-19 to minimize any interruption to their students' educational experience, some students reacted swiftly by alleging that the solution was inadequate. There is no doubt that colleges will continue to adjust, but adjustments should be made keeping in mind the need to minimize potential liability from dissatisfied students.

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