

## WHAT COLLEGES AND UNIVERSITIES SHOULD KNOW ABOUT TUITION- AND FEE-REIMBURSEMENT LAWSUITS

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While institutions of higher education work with public health officials and state governments to slow the spread of COVID-19, a new concern is rapidly emerging. Since March 27, nearly 80 class action lawsuits have been filed against institutions of higher education in federal district courts across the United States, with more pending in a growing list of state courts, including Ohio. Every day brings multiple new filings, each sharing a common theory: that an online or remote education is worth less than the on-campus education for which the student paid. Indeed, a core group of well-established plaintiffs' firms are actively recruiting plaintiffs to serve as lead plaintiffs and class representatives.

### **Class Action Claims**

To be clear, these plaintiffs are not alleging that colleges and universities were *wrong* to close their campuses; most would acknowledge that the closures were well-intended for the safety of students. Nevertheless, the plaintiffs argue that colleges and universities should not be allowed to retain students' tuition dollars after switching to remote learning. Simply put, they argue that a remote education is not worth as much as an on-campus one.

The causes of action alleged in each of these cases are generally the same. Most plaintiffs bring two alternative theories for their damages: breach of contract and unjust enrichment. Some include a third claim based in state common-law theories of conversion. In general, the complaints seek as remedies compensatory damages and prejudgment interest; some also allege that punitive damages are appropriate, though that request is most likely a long shot based on the circumstances surrounding campus closures.

### **Defense Considerations**

For many institutions of higher education, this may be their first experience with a class action lawsuit. While class actions sound complicated, they typically follow a familiar path. A single plaintiff, or a small group of named plaintiffs, allege that they represent a "class" of similarly situated persons whose claims may be decided as one, based on common factual and legal issues involved in their cases.

One way to defend a class action successfully is to show the court that the members of the alleged "class" are not similarly situated – that is, that the court needs to take account of "individualized" issues. In this context, for example, not every student may be affected in the same way by a remote educational experience. Students who are focused on the humanities, for example, may be better situated to continue their course of education than students in the physical sciences, who may have required on-campus laboratory access to further their studies.

Additionally, because plaintiffs' lawsuits turn on the "promises" made to students, colleges and universities should consider how they may establish that they are continuing to deliver the educational experiences advertised in their promotional materials. Plaintiffs who argue that a remote education is a "lower quality" than they expected are less likely to succeed on a breach of contract claim than plaintiffs who can identify a specific, objective promise made impossible by remote learning.

### **Practical Considerations**

Even if your institution has not yet been sued, there are proactive steps that institutions of higher education can and should take.

- Collect and organize documents associated with the payment of tuition, including any terms and conditions or other contractual provisions.
- Identify any specific promises made to prospective students, prior to enrollment, in your institution's promotional materials or on your institution's website.

- Remain mindful of attorney-client privilege by coordinating with in-house and/or outside counsel as you do in any pre-litigation investigation.
- Prepare consistent talking points for use by staff when addressing student or parent inquiries or media outreach.
- Identify whether any refunds may be appropriate to students for particular items – like room and board costs – if those have been charged in addition to tuition.
- Evaluate and, if practicable, outline in detail the costs incurred by the school in providing remote or online education programs, including IT support and other additional hardware and software costs.
- Consider your crisis-management protocols before responding to any media inquiries.
- Be proactive. This is a fast-moving and expanding new area of litigation. Colleges and universities have many pressing concerns right now, but being prepared is the best way to guarantee that a class action is not the next new crisis you will face.

This Client Alert provides only a high-level summary of some of the many issues and considerations involved in the emerging tuition-reimbursement litigation. Tucker Ellis attorneys are closely monitoring the filing of these lawsuits in both federal and state courts. Should you have any questions or need any assistance, please contact the following attorneys for more information.

#### ADDITIONAL INFORMATION

For more information, please contact:

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