COVID-19: CLASS ACTIONS IN SESSION

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In response to the COVID-19 crisis, colleges and universities across the country have closed campuses and moved classes online. Individuals who have paid costs of attendance for the 2020 academic year have filed putative class action suits against a growing number of these schools. In each case, the classes are generally composed of (1) students who have paid tuition and/or student activity fees, (2) family members who have paid tuition and/or student activity fees, or (3) both. The lawsuits raise similar allegations, most notably that online learning is of lesser value than an in-person experience, whether because of the purportedly reduced value of the service itself or the value of an educational degree earned through online learning, and that schools have precluded students from activities and full use of the facilities for which they have already paid. Based on these allegations, plaintiffs have asserted putative class claims for breach of contract, unjust enrichment, and conversion. To date, there are over 30 suits seeking refunds of tuition, room and board, and other fees. An analysis of the complaints filed to date provides some insight into how schools might defend class action COVID-19 refund claims.

INITIAL CONSIDERATIONS FOR DEFENDING CLASS ACTION REFUND CASES

There are a number of different tactics that schools could potentially use to defend a class action refund case, but the two key initial considerations include (1) the possibility of moving to dismiss the claims entirely and (2) the potential arguments for opposing class certification. Some initial considerations for these two defense strategies are discussed below.

Moving to Dismiss the Claims

As a preliminary matter, many of the complaints filed to date allege breach of contract claims, but do not attach a formal contract between the schools and their students. Plaintiffs largely base their breach of contract claims on alleged promises that the schools made through various publications regarding the school's services and on-campus experiences. Under federal pleading standards, the complaint must contain enough facts to state a claim to relief that is plausible on its face and raises a plaintiff's right to relief above mere speculation. Therefore, absent reference to specific contract language promising the specific benefits allegedly denied to plaintiffs, putative class breach of contract claims may be susceptible to an initial motion to dismiss challenge.

To the extent a contractual relationship or a binding set of terms and conditions exists, the terms governing the relationship could give rise to a number of different arguments at the motion to dismiss stage. For starters, a school could potentially argue that, in closing its campus and shifting to online learning, it has substantially performed its obligations, particularly in the absence of provisions requiring the educational experience take place in person. Any provisions allowing a school to implement emergency measures, including those that may alter the academic experience, in order to respond to a disaster or to comply with state emergency orders, may be relevant. Most, if not all, academic institutions have policies governing refunds of tuition, housing, and other fees

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for students that voluntarily withdraw or are involuntarily removed from the school. Although we understand that many schools have created new COVID-specific refund policies, the school's pre-existing terms and conditions may or may not contemplate suspension of on-campus activity due to a pandemic or other natural disaster. To the extent governing terms, conditions, or policies address, or may be construed as addressing, those types of circumstances, schools may potentially invoke terms that expressly or implicitly limit or preclude refunds. For example, a provision eliminating a student's right to a refund in the event of a school closure could help defeat an argument that a refund should be paid while a school continues to provide online education.

In addition to reviewing substantive contractual provisions or applicable terms, conditions, or policies, schools should also consider reviewing any provisions governing how disputes with students are to be adjudicated. Some plaintiffs may be bound by a mandatory arbitration agreement that contains a class action waiver clause requiring claims to be resolved in arbitration on an individual basis. Such provisions could provide a school with a basis for moving to stay or dismiss the class action claims in favor of individual arbitration proceedings.[1]

Finally, the existence and scope of any contractual obligations could impact the viability of any unjust enrichment claims. Unjust enrichment claims are typically subject to dismissal if there is a contract governing the parties' dispute.

Opposing Class Certification

If a motion to dismiss is unsuccessful, a school must next consider how best to oppose class certification. Whether or not a school moves to dismiss, it must begin evaluating class certification defenses immediately upon being sued. Indeed, a school should consider all early case strategy, including motion to dismiss arguments and pre-class certification discovery, in terms of how to best defeat the class certification requirements. Class certification under Rule 23 of the Federal Rules of Civil Procedure requires the following criteria to be satisfied:

1. Numerosity: the class is so numerous that joinder of all members is impracticable;
2. Commonality: there are questions of law or fact common to the class;
3. Typicality: the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. Adequacy of representation: the representative parties will fairly and adequately protect the interests of the class.

To succeed on a class certification motion, a named plaintiff must also satisfy one of the requirements of Rule 23(b). In these refund-based cases, the plaintiffs primarily seek damages and thus appear to focus on Rule 23(b)(3), which requires them to also establish: (1) predominance: that common issues predominate over individual issues and (2) superiority: that the class action mechanism is the superior method for adjudicating the dispute.

While a school can seek to challenge all of the class certification prerequisites, the predominance, commonality, and typicality requirements may provide particularly useful means to oppose class certification. A school may be able to argue that a class fails to meet the predominance and similar commonality requirement for a number of different reasons. For example, a class containing students who are enrolled in different programs, situated in different years of study, paying different costs of attendance due to financial aid or scholarships, or even attending class with various degrees of diligence, arguably fails to satisfy predominance, particularly if the different groups

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of students are subject to differing terms and conditions of enrollment and the alleged harm, if any, varies widely. Indeed, to the extent a contractual relationship is implied with each student or not otherwise agreed-upon in writing, the individualized nature of that relationship could preclude a finding of predominance. Further, an argument could be made that no two class members use the in-person resources of a school in the same way, and therefore any alleged injuries resulting from a campus closure or shift to online learning are arguably individualized and unfit for resolution through the class action vehicle.

A school can also analyze the circumstances and facts of the named plaintiff's individual claims on typicality or adequacy of representation grounds. If a named plaintiff is sufficiently distinct from the other class members and therefore subject to unique defenses, e.g. he or she is on full scholarship, participates in a unique program, or never goes to class, the school may argue that the named plaintiff is atypical or inadequate and, thus, that a class cannot be certified.

Additionally, a school may be able to take advantage of the heightened Rule 23 class certification requirements federal courts impose on named plaintiffs. A named plaintiff must affirmatively demonstrate actual compliance with each of the required elements through evidentiary proof.[2] A school defending a class action in federal court may therefore be able to defeat class certification by ensuring that the court rigorously scrutinizes whether a named plaintiff has met his or her burden for class certification. A school facing a state court class action should consider removing the case to federal court to benefit from the strict federal class certification requirements.

Apart from the above, there are undoubtedly other arguments for opposing class certification. Indeed, opposing class certification is a fact-specific inquiry and a school may use pre-class certification discovery to uncover further defenses to defeat a motion for class certification.

CONCLUSION

Colleges and universities may see an increase in COVID-19-related litigation in the upcoming months, which may include more putative class action refund cases. As discussed above, a school defending such claims should review its enrollment agreements (if any), terms and conditions, and fee-related policies to evaluate various defense strategies that can be utilized at the outset of litigation. Even if a school is unable to defeat a class action refund claim early on, additional defenses could become available through discovery and during later stages in the litigation. Schools should also consider other potential avenues for mitigating the effects of COVID-19-related lawsuits, such as liability insurance.[3]

For additional information regarding defending class actions in federal court, see the K&L Gates *Defense of Class Action Litigation in Federal Court*.

FOOTNOTES

[1] Notably, even if a named plaintiff is not subject to an enforceable arbitration agreement supporting an early motion to compel arbitration, the fact that some putative class members' claims may be subject to such agreements that restrict their participation in a class action, whether as a class member or a class representative, could support a defense to a motion for class certification because determining whether each putative class member is subject to an arbitration agreement would require individualized analyses for each putative class

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member.

[2] *See Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013).

[3] For additional information regarding COVID-19 insurance policy considerations for higher education institutions, please see this previously published alert.

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