Education

Litigation Strategies For Colleges and Universities Sued Over COVID-19 Campus Closures

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As a result of COVID-19, thousands of colleges and universities have closed their campuses and moved to online learning for the remainder of the 2019-2020 academic year. For some schools, this has meant shuttering dormitories and requiring students to relocate. For others, dormitories remain open but students are strongly encouraged to leave campus. And, in all cases, in-person extracurricular activities and sporting events have been suspended. The disruptions to university operations necessitated by today's public health challenges are significant.

Among the difficult questions colleges and universities now face is how to handle payments for room and board, as well as other fees, that students have already paid. There are good reasons why a university may choose not to return such fees, among others: many of the costs those fees cover will already have been incurred, such fees are frequently used to employ university staff who may be hard and costly to rehire if have they have to be laid off now, and maintaining buildings and facilities is mandatory if a university wants to reopen quickly when the COVID-19 crisis has passed. A recently filed lawsuit, *Rosenkrantz, et al. v. Arizona Board of Regents*, No: 2:20-cv-00613 (D. Ariz. Mar. 27, 2020), raises this issue through a putative class action lawsuit.

In *Rosenkrantz*, the plaintiffs allege they paid room and board as well as activities fees that Arizona State University, University of Arizona, and Northern Arizona are now improperly refusing to refund. The lawsuit claims the schools were correct to advise students to spend the remainder of the semester off-campus if they could do so, but that concomitant with that recommendation was an obligation to refund room and board as well as other fees for services students claim they are no longer receiving (such as a "Recreation Center Program Fee," an "Activity Fee," an "Information Technology/Library Fee," and a fee for "Student Media"). The plaintiffs allege that the universities' refusal to refund these charges—or, in the University of Arizona's case, offer a rent credit for the 2019-2020 or 2020-2021 academic years—constitutes breach of contract, unjust enrichment, and conversion. In addition to asking the court to certify classes of individuals who paid the cost of room and board and paid fees, the lawsuit seeks an injunction requiring the refunding of all such monies paid, with interest.

While we hope this litigation will not become a trend, particularly given the priorities and demands that universities are working hard to meet at this challenging time, *Rosenkrantz* may prompt copycat actions. If so, several key arguments are available to universities for moving to dismiss such actions and opposing class certification.

First, the gravamen of these cases is that students (or those paying on their behalf) have not received the benefit of the bargain. This claim could be countered in a number of ways as a matter of law even before potentially costly and burdensome discovery. To begin, federal courts generally accept that the text of a contract is incorporated by reference into a complaint about that contract; thus, defendants can use contractual language to support a motion to dismiss. In cases such as *Rosenkrantz*, then, the actual texts of the relevant tuition agreements can play an important role even at the motion-to-dismiss stage. Do the agreements have reimbursement guarantees? What exactly is promised to students as a result of paying room and board and fees? Do the agreements have *force majeure* clauses that waive otherwise applicable contractual requirements in cases of natural disasters or "acts of God" beyond the institution's control? And if such provisions exist, how are they defined? Likewise, who are the parties to the agreement—the students or those paying their fees? If it is the former, is there even

privity of contract for parents of students to bring breach of contract lawsuits? As with any contract case, the viability of a plaintiff's claim will turn on the extent to which a specific contractual provision provides a guarantee that has been breached. Universities can hold plaintiffs to their burden of identifying with specificity and plausibility the precise contractual guarantees that are at issue, and the contract's text may be a powerful basis for dismissing some or all of the claims.

Second, even assuming the text of the relevant agreements do contain straightforward guarantees without exceptions for extraordinary situations, colleges and universities should carefully parse the complaint to see if it actually alleges a breach. For example, as *Rosenkrantz*'s own allegations show, institutions in Arizona have not actually shut their dormitories and food halls and, for students who have nowhere else go to, university room and board options remain. That plaintiffs may have voluntarily decided that it is safer for them to leave campus is of course a choice they are free to make. And a university may sensibly have encouraged them to make that choice. But that does not mean a university has breached a contractual obligation. Similarly, since the internet can replicate many aspects of campus life virtually, students may still be gaining benefits from fees for which they have paid. If student organizations continue to function, student media outlets continue to produce material, and university libraries continue to provide students with myriad online resources to aid in their learning, it may well be (at least for some fees) that the plaintiffs *are* receiving the benefit of the bargain for which they have paid. Ensuring that specific and plausible allegations exist to substantiate each instance of a breach is critical, and courts will likely dismiss part (or all) of a suit where this is not the case.

Finally, as is the case with *Rosenkrantz*, lawyers bringing these suits will seek to have classes of students (or those who have paid on behalf of students) certified in order to maximize the chance of large cost-recoveries and lawyers' fees. At first glance, it may seem that this type of suit is well suited to class certification: the contractual language is likely uniform, and the alleged damages may not be difficult to calculate. But the superficial similarity of plaintiffs' claims masks salient issues that could be the basis to challenge class certification. Most critical, Federal Rule of Civil Procedure 23(a)(2) requires "commonality," namely that common questions of law and fact exist in the case and that a class-wide proceeding can generate common answers that will drive resolution of the litigation. Because the basic argument here is that students have not gotten what they paid for, determining whether that is actually the case might well turn on myriad factual distinctions peculiar to each plaintiff. For example, some students may continue to derive benefits from activity fees they have paid—for example using school-provided technology or gathering virtually with student organizations—while others might not. The notion that a university has breached its contract with a student by not providing the student with promised services is going to vary depending on the extent to which the student continues to actually benefit from the service or has voluntary chosen not to accept the service even if it is still being provided.

The decision of whether or not to refund fees that are used to pay the salaries of university employees and maintain university facilities so they are ready when campus reopens is of course a difficult one. When creative solutions—such as future semester credits—do not work for all students, lawsuits may be inevitable. In that situation, arguments such as those outlined above could be useful for institutions of higher education in reducing legal and financial exposure at a relatively early stage of the litigation.

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