Education and Litigation Alert: COVID-19 Lawsuits against Colleges for Opening or Closing during the Pandemic

On April 23, 2020, approximately a month after Cornell University transitioned to remote instruction due to the COVID-19 pandemic, student Olivia Haynie filed a class action complaint against Cornell in federal court. The complaint alleges that Ms. Haynie and her peers "lost the benefit of the education for which they paid" as a result of sub-par remote instruction. Ms. Haynie demanded a tuition refund for herself and her peers. Since Ms. Haynie's lawsuit, hundreds of similar lawsuits have been filed against colleges and universities.

COVID-19 has placed universities in a no-win position. If they implement remote instruction as a substitute for the in-person classes traditionally offered, complaints about the quality of instruction are inevitable. However, if they bring students back to campus, they face the risk that COVID-19 infections can escalate rapidly. UNC Chapel Hill and Notre Dame have just rolled back months of COVID-19 preparation, choosing to move their students to remote instruction after infections appeared immediately upon the students' return to campus at the beginning of the semester. The pandemic has placed universities in a bind, putting them at risk of being sued regardless of whether they decide to close or open. The viability of these lawsuits, however, is questionable.

Lawsuits based on remote learning

Lawsuits seeking damages from colleges who have switched to remote learning mainly involve claims of breach of contract, unjust enrichment and/or conversion.

Breach of contract claims require (1) a contract between the parties, (2) one party's performance, (3) the other party's failure to perform and (4) the non-performing party's failure to perform damaging the other party.

The Cornell University lawsuit and others attempt to rely on marketing material from the universities that promotes the "on-campus experience." Whether courts will accept a statement made in college marketing materials as a contract term is doubtful. Notably, the plaintiffs in the Cornell action do not reference language from traditional written contracts with the universities. Most universities are savvy enough in their acceptance or tuition agreements to not box themselves into guaranteeing specific items, such as on-campus classes or services. Most likely, marketing material promoting the "on-campus experience" will be interpreted as a university's offer to contract, which would then have to be incorporated into a binding contract in order to give rise to a viable breach of contract claim.

The damage to these students is also questionable. While socially remote instruction may be sub-par, it is unlikely to affect the tangible end result – that the student obtains credit from the university to complete a degree. Further, while students' dissatisfaction, frustration and other non-economic damages may be real, contract damages must generally be foreseeable at the time the contract was

made. Under that criterion, an unexpected pandemic requiring universities to conduct remote learning will probably not be held to have been foreseeable. This would leave students, at best, with a lawsuit for economic damages only, and such damages are minimal if the students still obtain the result they bargained for – a college degree.

Unjust enrichment and conversion claims are also typically confined to economic damages. Unjust enrichment requires that a party enriched at another's expense disgorge the profits to the injured party if equity requires. Conversion requires that a defendant have intentionally interfered with a plaintiff's property right. Under these claims, payments made by students for meal plans and on-campus living that they were deprived of this past spring may be viable damages. Most universities, however, including Cornell, have already refunded or provided credits for lost housing and dining services. And, as for allegations that the universities were enriched by remote learning, universities still had to pay their professors to teach remotely and incurred similar, or greater, expenses in order to respond to COVID-19.

Remote learning lawsuits may not go very far. While it is too early to be certain, it is unlikely that these lawsuits will reap any substantial benefit for plaintiffs.

Lawsuits based on opening campuses

Lawsuits against universities which have decided to allow students back on campus for in-person instruction are on the horizon. In May, more than a dozen college presidents met with Vice President Mike Pence. A portion of the meeting was dedicated to a discussion of whether colleges would be given immunity against lawsuits alleging that a college's negligence caused someone to become infected with COVID-19.

It is unlikely that immunity from COVID-19 negligence lawsuits will be granted to universities. Already, temporary immunity for hospitals and nursing homes has been rolled back in a number of states, including New York. Even without immunity, however, it will be difficult to bring a successful lawsuit against a university for damages relative to a COVID-19 infection because of two legal principles: causation and comparative fault.

In a negligence lawsuit, a plaintiff must show by a preponderance of the evidence that a defendant caused his/her injury. In a university setting, where students are able-bodied adults engaging in on- and off-campus activities, the cause of a person's COVID-19 infection will be difficult to establish. Given COVID-19's broad incubation period (2 to 14 days), proving causation against a university becomes even more problematic. While people might be able to guess where they contracted COVID-19, it will be hard to establish that location by the legal standard.
Comparative fault is the other obstacle any negligence lawsuit will face. Under this legal principle, when a person is damaged by the negligence of another, the fault or negligence of all parties in bringing about the harm — including the party bringing the claim — must be considered and determined. The risks of infection with COVID-19 are widely known. It is also widely known that social distancing, mask wearing and proper hygiene mitigate those risks. Any student who contracts COVID-19 who has congregated with a group, or failed to wear a mask, or failed to maintain proper hygiene will certainly be held, at least to some extent, comparatively negligent if not entirely at fault for any damages they suffer as a result of becoming infected.

Universities are highlighting COVID-19 risks to students. Cornell University and others have required

their returning students to sign a Behavioral Compact or Safety Pledge if they wish to be on campus. These agreements identify safe conduct that mitigates the risk of transmitting COVID-19 and require students to commit to such conduct. Universities may use these agreements to defend themselves if they are sued for negligence regarding a COVID-19 infection, to demonstrate that the signatory knew of the risks, knew what steps he/she should take to mitigate those risks, and disregarded them.

Despite the seeming difficulties of such lawsuits, it is still too early to tell how either the Legislature or the courts will ultimately regard COVID-19 lawsuits against universities. This is an evolving area of law where we can expect to see future legislation and litigation.

If you have a question or would like more information about the issues addressed in this alert, please contact any member of Hancock Estabrook's litigation department.