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## 'Watching the Outcome Like a Hawk': COVID-19 Tuition Refund Fights Heat Up in Appeals Courts

Appeals to dismissals of COVID-19 tuition refund lawsuits are pending in the U.S. Court of Appeals for the D.C., Second, Fifth and Seventh circuits.

By Avalon Zoppo | February 01, 2022



American University Washington College of Law in Washington, D.C. Photo by Diego M. Radzinski/ALM

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After failures in district courts, a handful of students have taken their COVID-19 tuition refund fights to appellate courts in cases that are being closely watched by the higher education community.

Many of the lawsuits, alleging universities breached contracts by shifting to virtual courses while charging in-person prices, were dismissed by district court judges, though results have been mixed. Claims that survived tended to be those seeking compensation for specific fees, such as student activities promised but not delivered during campus closures, observers say.

No circuit courts have issued decisions on the matters yet, but recent oral arguments hint that the idea schools overcharged for remote learning has weight with some judges, said Stetson University Law School professor Peter Lake.

"If you would have called me a month ago, I probably would have said the general trend is unmistakable, the tuition cases are dying ... and the exception would be where there was a very specific promise to a particular class of people to deliver something," Lake said. "It may well be that the circuit upholds the dismissals ... but I'm sensing there could be change."

Lake says unjust-enrichment claims may have solid footing. Under unjust enrichment, students contend that in the absence of contracts, universities unfairly profited by switching to inferior remote learning. Those claims would only hold, however, if judges determined there was no breach of contract.

"I am noticing that there is a certain amount of energy at this moment that's gathering around this idea of unjust enrichment," he said. "That's why we're watching the outcome like a hawk in this D.C. case because that could be a game changer."

More than 250 lawsuits were filed over unpaid refunds after March 2020, according to a tracker (<https://www.law.com/2020/12/29/lawsuits-filed-in-2020-over-covid-19-were-diverse-but-limited/>) created by Bryan Cave Leighton Paisner. Appeals to dismissal orders are now pending in the U.S. Court of Appeals for the D.C., Second, Fifth and Seventh circuits.

Earlier this month, Judges Harry Edwards and Patricia Millett, of the D.C. Circuit, appeared at times to side with students who want their class action lawsuits against George Washington University and American University revived. The district court in D.C. allowed a similar suit against Catholic University to go forward.

The schools have contended they only promised classes and course credits in exchange for tuition, not in-person instruction "no matter what." Due to local COVID-19 shutdown orders, the universities argue they were legally unable to offer an in-person experience in the spring of 2020.

But Edwards noted that there's a clear difference between virtual and in-person learning, and questioned if universities could charge the same amount for the remote experience.

"You're saying the contract is 'We reserve to keep all of your money for the full service, but we're gonna actually put you into a lesser category and as long as we do that in good faith, you're not entitled to any of your money back,'" Edwards said. "That's what the deal was?"

Meanwhile, Judge Ketanji Brown Jackson appeared more skeptical.

George Washington University's attorney Daniel Kurowski, of Hagens Berman Sobol Shapiro, said students expected live classes on campus and are entitled to refunds since the school was unable to deliver on its end of the deal. But Jackson pushed back, questioning whether the contract between the two parties included an implied "money-back guarantee" if in-person classes had to be canceled and noting that holding courses on Zoom wasn't permanent.

“The shift here was not to an online degree ... the shift here was temporary. A temporary period of online instruction is not the same thing as an online degree,” Jackson said. “Even if there was that term, isn’t it subject to an implicit condition that whatever they’re offering has to be consistent with the law?”

Two similar appeals—one in the Seventh Circuit against Loyola University and one in the Fifth Circuit against Baylor University—have also been argued recently.

During Jan. 5 oral arguments in the New Orleans-based court, Judge Edith Jones stressed that in-person and online learning are different. Tycko & Zavareei attorney Glenn Chappell, who represented the student suing the school, argued the university markets its online and in-person programs separately, charging higher rates for the former, and students paid for an in-person experience but received a different product.

“The world has been doing online for nearly, God forbid, two years now. Nobody takes the position that it is fully comparable to in person, whether it’s court hearings, or business meetings or learning,” Jones said at one point. But the university’s attorney, Kyle Douglas Hawkins of Gibson, Dunn & Crutcher, responded that in-person learning was dangerous in the spring of 2020.

Jim Lawrence, a partner on Bryan Cave’s Higher Education Team, said he is closely watching the appeals. Lawrence previously represented schools at the district court level.

While few cases are getting beyond the pleading stage in district courts, Lawrence said decisions from appellate courts will give more clarity to schools on the future of these class actions.

“These are important and influential circuit courts, and the issues in [the D.C. and Second circuits] address many of the core claims across most of the tuition refund lawsuits. Until there is a consensus out of the circuit courts on some of these key issues, weighing the risks of continued litigation will continue to be difficult,” Lawrence said. “[Decisions from appeals courts] could clarify the road ahead for many of the litigants.”

State legislators have also gotten involved in the debate over tuition refunds in ways that may impact appeals.

In Florida (<https://www.tallahassee.com/story/news/2021/06/30/florida-gov-ron-desantis-signs-bill-shielding-colleges-universities-student-covid-refund-lawsuits/7811384002/>) and Louisiana (<https://www.businessinsurance.com/article/20200710/NEWS06/912335568/New-Louisiana-law-protects-schools-from-COVID-19-lawsuits->), the states passed laws last year granting immunity to colleges that were forced to modify or cancel classes due to the pandemic, though both pieces of legislation outlined exceptions. But more recently, according to media reports (<https://floridapolitics.com/archives/482963-gov-desantis-college-students-forced-to-learn-online-deserve-tuition-refunds/>), Florida Gov. Ron DeSantis said students forced to learn remotely due to their university’s pandemic response deserve full tuition refunds.

In his brief for Baylor University, Hawkins pointed to a similar law (<https://www.law.com/texaslawyer/2021/08/05/texas-new-pandemic-liability-protection-act-what-attorneys-plaintiffs-and-defendants-need-to-know/>) signed by Texas Gov. Greg Abbott as reason to dismiss the case. Chappell, in turn, argued that the law is unconstitutional and doesn’t apply to cases filed before the law was passed.

“These statutes may give the federal appeals courts an opportunity to address how the federal Contracts Clause and similar provisions in state constitutions apply to laws designed to protect educational institutions from liability for actions taken in response to the pandemic,” Chappell said.

