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ANTICIPATING CLAIMS AGAINST HIGHER EDUCATION

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The end of the 2019-2020 school year was unique for college and university students throughout the country, to say the least. In mid-March, school administrators started seeing the writing on the wall—the federal government issued warnings about a novel virus, and state and local officials considered shutdowns of restaurants, retail stores, and hotels. Higher education officials were facing a powder keg. Colleges are responsible for a large group of students, living, studying, and recreating together. How can they ensure their students' safety with a new, highly contagious respiratory virus? First, spring breaks were extended. Then, campus-wide shutdowns and virtual learning began.

Now, college officials are facing another challenge. Along with the financial difficulties that accompany a world-wide economic downturn, students are asserting claims against their alma maters for a refund of tuition and fees paid for the Spring 2020 semester. Students from the University of South Carolina, Duke University, Vanderbilt, Emory, and the University of Southern California have filed putative class actions, claiming these universities breached their contracts with their students, in part because, "online instruction is simply not commensurate with the same classes being taught in person." The also claim these schools have been unjustly enriched and have wrongfully retained portions of the tuition and fees students paid.

These individual students are asserting claims on behalf of all students who have paid tuition or fees to their respective schools. According to the South Carolina Independent Colleges and Universities, there were almost 34,000 undergraduate and graduate students enrolled in those courses as of the Fall semester of 2017. Add to that the more than 100,000 students enrolled at one of South Carolina's public colleges like USC, Clemson, SC State, Winthrop and The Citadel, and it is simple to understand the potential risks these lawsuits pose to the survival of institutions of higher learning.

1. South Carolina's public policy does not support these claims against important institutions like colleges and universities.

The South Carolina Supreme Court has already made a clear policy decision with respect to negligence and breach of contract claims against institutions of higher learning alleging

educational malpractice. The Court adopted the position adopted by courts in California barring such claims based, in part, on the immense value provide by these colleges and universities.

> California represents the position of the majority of states in refusing to recognize the tort of "educational malpractice" in claims brought by students alleging they received an inadequate education. *Peter W. v. San Francisco Unified Sch. Dist.,* 60 Cal. App. 3d 814, 131 Cal.Rptr. 854 (Cal. App. 1976) (seminal case); *Ross v. Creighton Univ.,* 957 F.2d 410 (1992) (considering Illinois state law and citing cases from eleven other states that have considered and rejected educational malpractice claims). Courts addressing inadequate education claims, identify several policy concerns with recognizing an actionable duty of care owed from educators to students: (1) the lack of a satisfactory standard of care by which to evaluate educators, (2) the inherent uncertainties of the cause and nature of damages, and (3) the potential for a flood of litigation against already beleaguered schools.

Hendricks v. Clemson Univ., 353 S.C. 449, 457, 578 S.E.2d 711, 715 (2003). When it comes down to whether students received a quality education, courts are not going to perform that subjective analysis. *Id*. ("The court placed on value on the plaintiffs' general allegations that they had not received the education they had been promised, and instead made clear that the claim was proceeding based on the plaintiffs' allegations that Cencor had obligated itself to provide such tangible things as modern equipment and computer training for all students." (citing *Cencor, Inc. v. Toman*, 868 P.2d 396 (Colo. 1994))). Accordingly, to the extent the students assert the education they received via remote learning technology is inferior to the education received via in-person instruction, courts are not likely to want to enter that thicket.

Additionally, the colleges can likely assert they could not perform their contracts and should not be punished for attempting to keep their students safe. In South Carolina, "[t]he law imposes no liability for injuries or damages sustained as the result for an act of God." *Montgomery v. Nat'l Convoy & Trucking Co.*, 186 S.C. 167, 177, 195 S.E. 247, 251 (1938). These institutions can likely argue they have been prevented from performing any agreement with their students by issues beyond their control, which should excuse any nonperformance.

These two defenses apply to both the claims relating to tuition expenses and to fee expenses. Although there may be others, it is likely these two will provide cover to institutions faced with the seemingly simple question of whether it is better to protect their students or continue providing in-person instruction.

2. The students' breach of contract claims are likely flawed based on both factual and legal issues.

Furthermore, there is some question about what a college must do to fulfill its responsibility to educate its students, especially during an international crisis. *See Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 593, 879 (Ct. App. 1997) ("A party to a contract must perform its obligations under the contract unless its performance is rendered impossible by an act of God, the law, or by a third party."). "A contract is formed between two people when one gives the other sufficient consideration either to perform or refrain from performing a particular act." *Hendricks*, 353 S.C. at 459, 578 S.E.2d at 716. "Offer and acceptance are essential to the formation of a contract." *Id*. While some aspects of the student/university relationship are no doubt contractual, "not all aspects of [this] relationship are subject to a contract remedy." *Id*. at 460, 578 S.E.2d at 716.

The students assert they "entered into contracts with the [University] which provided that Plaintiff and other members of the Tuition Class would pay tuition, and, in exchange, the [University] would provide live[,] in-person instruction in a physical classroom." The students claim the University breached its contract by "moving all classes for the Spring 2020 semester to online distance learning platforms, without reducing or refunding tuition accordingly."

It is clear the students paid tuition to receive instruction from the University. Thus, the important question here is, what are the terms of the contract? Did the handbook or other college publications indicate all classes would be held in-person? Did any of the instructors already provide virtual instruction to their students? Did any students pay tuition for which they did not receive in-person instruction, i.e., practicums? These are all factors that may indicate no such contract existed.

Indeed, unless the students can provide some evidence of a written promise that classes would be held in-person or evidence to support such an implied promise, the claims are not likely to be successful. *See Hendricks*, 353 S.C. at 461, 578 S.E.2d at 717 (finding Hendricks "fails to point to any written promise from Clemson to ensure his athletic eligibility, and submits no real evidence to support his claim that such a promise was implied"). While each college and university's factual scenario will be different, it is likely no such promise was ever made and any advertisements won't be sufficient to create one.

3. The students' unjust enrichment claims are similarly flawed.

Perhaps acknowledging the lack of evidence of a contract, the students plead unjust enrichment as an alternative cause of action to the breach of contract claim. Recovery requires proof: (1) the colleges received a benefit from the students; (2) the colleges realized that benefit; and (3) the colleges retained the benefit under conditions that make it unjust for them to retain it without paying its value. *See Columbia Wholesale Co. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994).

It is very unlikely, given our supreme court's decision in *Hendricks*, that a trial court is going to exercise an equitable remedy where a legal remedy has already been foreclosed. The public policy reasons underlying the court's refusal to adopt educational malpractice

tort or contract claims are the same with respect to equitable claims which require the court to exercise its discretion to formulate a remedy.

Additionally, it would be a peculiar finding indeed were a judge to determine it would be unjust for colleges to retain tuition receipts when the colleges worked to ensure students still had the opportunity to secure credit hours and a good education in the middle of a global pandemic.

These uncertain times have required herculean efforts to keep our state's dozens of higher education communities running. Unfortunately, uncertainty many times leads to litigation, and this situation is no different. This lawsuit against USC is only the first of many I'm afraid, and the impacts could be long-lasting. However, as the legal process works its way through, I am hopeful courts will recognize the impossible position these institutions found themselves in, through no fault of their own. Students and colleges suffered as a result of this unprecedented virus. It would be salt in the wound if lawsuits like these lead some of our state's schools of higher learning to close. The Court's guidance in *Hendricks* provides some hints as to how these cases may play out, whether through an in-person hearing, or, like the students' final weeks of lectures, electronically via video-conference.

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