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The Business Suit

The newsletter of the Commercial Litigation Committee

6/2/2020 Volume 24 Issue 2

Committee Leadership

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Leadership Notes

From the Editor

By C. Bailey King, Jr.

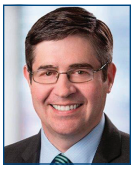
Greetings from the Publications Subcommittee. As we slowly start to open back up the country and begin the return to our offices, we are proud to bring you this issue of the *Business Suit*. As we think you will see in this issue, although the COVID-19 crisis has forced an economic "shutdown," the Commercial Litigation Committee has not slowed down. While we miss seeing everyone in person at our seminar this month, we hope that this issue of the *Business Suit* will introduce you to new colleagues, highlight our section's expertise, and keep you connected. In particular, in a relatively new feature, we are spotlighting two members, Sarah Spencer and Emily Ruzic, who are especially instrumental in keeping us all connected during this difficult time in their roles as the webinar co-chair and the social media chair respectively. Please consider reaching out to thank them. In addition, Andrew Sayles has authored a piece updating us all on continuing developments in litigation under the Telephone Consumer Privacy Act. Showing that we are truly an international section, Santiago Nadal, our colleague from Barcelona Spain, provides us with a look into how a topic on all of our minds as a result of the covid-19 crisis, force majeure clauses in contracts, are impacting commercial relationships in Spain. Finally, Eric Samore, Ronald Balfour, and Michael Chang explore the ramifications of university closings due to COVID-19 and what institutions can expect as students file class actions against them.

And, of course, we lead off with an update from our vice chair Dwight Stone and an invitation to reconnect at the DRI Summit this October, and a call to action from our membership chair Matt Murphy on one small thing we can all be doing to stay connected during this time—recruiting new members. We hope that you can take a break from your work from home routine to enjoy this issue of the *Business Suit*, and that you will follow Matt Murphy's advice and help us to build an even stronger section as we return to our "new normal."

Bailey King is a partner and trial attorney with Bradley Arant Boult Cummings LLP in Charlotte, North Carolina, with over 12 years of experience representing businesses and individuals in complex commercial litigation. He has tried numerous bet-the-company and other high-profile matters to verdict on behalf of both plaintiffs and defendants. With the benefit of his trial and litigation experience, Bailey is also able to counsel his clients effectively on strategies to avoid potential litigation and to negotiate favorable settlements before trial. In recent years, he has focused his practice in the areas of intellectual property litigation (including trade secrets, trademarks, copyrights, and patents), securities and investment disputes, and complex contractual disputes.

From the Vice Chair

By Dwight W. Stone II



I am privileged to serve as vice chair of the Commercial Litigation Committee, working with our chair, Tracey Turnbull. As with virtually everything else in our country and the world, the COVID-19 pandemic has disrupted the CLC's original plans for 2020. However, due to the impressive dedication and efforts of our CLC leaders and active members, and the support we have received from DRI leadership and staff, our committee is moving ahead strongly with a range of activities.

As you all know, we were unable to hold the 2020 Business Litigation Super Conference in Minneapolis in May as planned. DRI recently informed us that, despite best efforts, it is not feasible to reschedule the conference in the fall. *However*, we will be able to hold the 2021 Business Litigation Super Conference at the same location in Minneapolis, May 13–14, 2021. We expect that this will allow us to include many of the excellent presentations that were planned for the 2020 Super Conference, which is a nice bonus. Even better, Program Chair Charlie Frazier and Vice Chairs Peter Lauricella and Liam Felson, who did such an excellent job on the 2020 program, have graciously

agreed to reprise their roles for 2021. I am really excited to see how the program for 2021 develops.

As you can see from this issue of the *Business Suit*, our Publications Committee is in fine form. If you have any interest in getting published in DRI publications, which also include *The Voice*, *For The Defense*, and *In-House Defense Quarterly*, contact our Publications Chair, Jamie Weiss, or any of the SLG publications chairs, or Tracey or me. There are a lot of opportunities to share your legal expertise with the DRI world and increase your profile at the same time.

All of our Specialized Litigation Groups (SLGs) are moving forward with regular calls and other activities. A special shout-out goes to the Class Action SLG, who are nearing completion of their state class action compendium, which has been an epic project. And, after lengthy and impressive service as Class Actions SLG Chair, Mike Pennington has turned over the reins to Natalie Kussart. Congratulations and thanks to Mike and Natalie!

Webinars are another way that the CLC is delivering valuable information to our members. Maryan Alexander and Sarah Spencer are our Online Programming co-chairs, and they are hard at work planning some excellent programs covering a range of timely topics. Be on the lookout for them throughout the year. If you have a proposal for a webinar, Maryan and Sarah would be glad to speak with you about it.

Finally, please plan to join us for the DRI Summit (formerly called the Annual Meeting) in Washington, D.C., October 21–24, 2020, at the famous Washington Hilton. You should be receiving a brochure before long with all of the exciting details. And rest assured, to the full extent that safety permits, our committee will conduct some seriously fun and productive networking. I can't wait to see you many of you there. In the meantime, if you have any questions or suggestions about the CLC and how you can get more out of it, email or call Tracey or me. We would love to hear from you.

Dwight W. Stone II is a partner in Miles & Stockbridge P.C.'s Baltimore office. Dwight's practice includes products liability and class action defense, toxic tort and environmental claims, insurance coverage disputes, and other complex business disputes. He regularly represents clients before the U.S. Consumer Product Safety Commission (CPSC). He has been repeatedly named one of the "Top 100 Maryland Lawyers" in Maryland Super Lawyers, and is listed in Best Lawyers in America for Class Actions/Mass Torts - Defendants, Commercial Litigation and Insurance Law.

Five Easy Steps to Recruit a New Member

By Matthew Murphy

DRI doesn't just happen. It is an organization that depends on its members' vision, industry, and connections to thrive. I know I am not the first to say it, but it is true that members who give more to DRI get the most out of it.

New member recruitment is one area where DRI, and the Commercial Litigation Committee in particular, depends on its existing members. If you are looking to get more out of DRI, this is an area you can easily get involved. In fact, here are five simple steps you can follow to recruit a new member:

1) Identify five new member candidates;

2) Reach out to them by phone and email to invite them to join;

3) Schedule a time to talk about DRI and the Commercial Litigation Committee;

4) Go over the benefits of membership, including the $100 CLE Credit they will receive when they join; and

5) Give them a member application with your name and the Commercial Litigation Committee already on it to ensure you and our committee receive the recruitment credit.

Once you have reached out to your likely candidates, selling DRI is easy. Members have the unique opportunity to engage with fellow professionals, exchange ideas, share referrals, and grow their practice all while creating enduring friendships. And don't forget that you receive a $100 CLE for each new recruit. This really is one of those situations where members who give more get more!

Please do not hesitate to reach out to me or any of my colleagues on the membership committee if you need help recruiting a colleague. We have all of the membership forms readily available, can answer any questions about DRI's recruitment incentives program, and can even provide you a script to use when recruiting new members.

Matthew C. Murphy is an shareholder in Nilan Johnson Lewis PA's Minneapolis office, concentrating on product liability, commercial litigation, and white-collar criminal defense. He is admitted to practice law in Minnesota and New York.

Member Spotlights

Sarah Elizabeth Spencer

Sarah Elizabeth Spencer is a shareholder attorney at Christensen & Jensen, P.C., in Salt Lake City, Utah. She practices law in Utah and Colorado. Sarah handles product liability cases, complex commercial and business tort cases, and appeals. Sarah joined DRI in 2008 and has been an active member since then. She started with DRI in the Young Lawyers Committee and later became involved in the Appellate Advocacy Committee. Sarah chaired the 2019 DRI Appellate Advocacy Seminar in Chicago. Sarah is currently the vice chair of the Appellate Advocacy Committee and the webinar co-chair for the Commercial Litigation Committee. In her free time, she enjoys vegan cooking and baking, skydiving, indoor skydiving (wind tunnel flying), skiing Utah powder, and spending time with her husband and two young daughters.

Emily Ruzic

Emily Ruzic practices in the Birmingham, Alabama, office of Bradley Arant Boult Cummings LLP. She appears in commercial litigation matters across all industries, with a particular emphasis on litigation arising out of mergers and acquisitions. Emily also has a robust natural gas practice, representing generation, transmission, and utility companies in litigation and regulatory matters across North America. Emily joined DRI in 2016 and currently serves on the Membership Committee. She is also on the Steering Committees for both the Commercial Litigation and Young Lawyers Committees, serving as Social Media Chair and Membership Co-Chair, respectively. In 2019, she received the "Unsung Hero Award" from the Young Lawyers Committee and was recognized at the 2020 Leadership Conference for her efforts as Vice-Chair of Membership for Alabama. Emily is a summa cum laude graduate of the University of Alabama School of Law (a top 25 law school per *U.S. News and World Report*) and a cum laude graduate of the Terry College of Business at the University of Georgia. In addition to being admitted in all courts in Alabama, Emily is also admitted to the U.S. Court of Appeals for the Eleventh and District of Columbia Circuits and the U.S. District Court for the Southern District of Texas.

Feature Articles

Appellate Rulings in 2020 Fortify TCPA Circuit Split Concerning Autodialers

By Andrew Sayles

The Telephone Consumer Protection Act, 47 U.S.C. 227 (TCPA) was enacted in 1991 to protect consumers from unrestricted telemarketing and restricts an array of communications directed to businesses and individuals. Among its terms are restrictions on the use of an automatic telephone dialing system ("ATDS" or "autodialer") to deliver calls or text messages to a number assigned to a cellular telephone without the recipient's prior consent. *See* 47 U.S.C. 227(b)(1)(A)(iii). A violation of the TCPA allows for the recovery of actual damages or fines of $500 or $1,500 per violative communication. Often, claims are presented as putative class actions involving thousands of communications.

Among the more common claims presented under the TCPA are suits alleging improper telemarking through the use of an autodialer. Section 227(a)(1) of the TCPA provides that "the term 'automatic telephone dialing system' means equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." Courts are in disagreement over whether an ATDS must have the ability to store randomly or sequentially generated numbers for dialing, or whether it must merely have the capacity to store numbers for dialing, regardless of how they are generated. This debate largely arises from the placement of the comma in subsection A and the modifying phrase thereafter. The distinction is significant given that TCPA violations can easily result in fines and civil liability into the millions.

Between January 27 and April 7, 2020, the Eleventh, Seventh, and Second Circuits weighed in on the definition of an ATDS resulting in a three to two circuit split and increasing the likelihood of Supreme Court review. The definition is significant in that broader approach has the potential to subject anyone using a smartphone to communicate to TCPA liability whereas critics of the narrow approach complain that it creates a loophole that allows telemarketers to evade the restrictions imposed by Congress on mass-marketing communications.

Development of a Circuit Split

The developments here are relatively recent. In 2015, the FCC issued an Omnibus Order which broadly defined an autodialer as any dialing system that had the potential capacity to dial randomly or sequentially. Although quickly challenged, the petition to review the FCC's interpretation was not addressed until 2018. At that time, the D.C. Circuit Court of Appeals reviewed and rejected the relevant portions of Omnibus Order allowing for federal courts to weigh in again. *See ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). There, the court found that under the FCC's interpretation "smartphones qualify as autodialers because they have the inherent 'capacity' to gain ATDS functionality by downloading an app. That interpretation of the statute, for all the reasons explained, is an unreasonably, and impermissibly, expansive one." *Aca Int'l*, 885 F.3d at 700. With the relevant portions of the Omnibus Order vacated, courts focused on the statutory definition of an ATDS, a process that often turned on principles of grammar and punctuation. That is, how does the modifier statement "using a random or sequential number generator" impact the conjoined verbs "store or produce" as they related to the direct subject, "telephone numbers" under Section 227(a)(1)(A).

The Third Circuit was the first to enter to fray. In *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018), the court was asked to determine whether an email SMS Service, which caused text messages to be sent each time an email was received but which did not have the ability to generate numbers, qualified as an ATDS for purposes of the TCPA. The court adopted a narrow interpretation and found that Section 227(a)(1)'s modifying clause—"using a random or sequential number generator"—was extended to both storing and dialing numbers. Because the system in place in *Dominguez* lacked the capacity to store randomly or sequentially generated numbers it did not qualify as an ATDS.

Shortly thereafter, the Ninth Circuit interpreted the same statutory language to encompass nearly all automatic dialing systems, finding that the modifying condition of generating random or sequential numbers did not apply to the verb "store." *See Marks v. Crunch San Diego, LLC*,

904 F.3d 1041 (9th Cir. 2018). *Marks* involved a web-based program that sent promotional text messages to a list of stored telephone numbers that were either manually entered by an operator or submitted by actual or potential customers. *Marks*, 904 F.3d at 1048. The court rejected arguments that the system's inability to randomly or sequentially generate stored numbers exempted it from the TCPA. Instead, the court found that an ATDS was "equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers automatically." *Marks*, 904 F.3d at 1053.

Often a precursor to a successful request for Supreme Court review, the issue percolated within the Eleventh, Seventh and Second Circuits resulting a burst of appellate rulings in 2020. On January 27, 2020, the Eleventh Circuit issued its holding in *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301 (11th Cir. 2020). There, the court heard a consolidated appeal involving two dialing systems: a system used for debt collection and a system used to promote time shares. Neither system utilized randomly or sequentially generated numbers. Rather, the numbers were stored based on specific information concerning the recipient—either a debt owed or demographic data concerning leisure interests. Lamenting that "clarity … does not leap off this page of the U.S. Code," the court conducted a detailed analysis that included statutory construction, legislative history and technological advancement. *Glasser*, 948 F.3d at 1306. The court found that Section 227(a)(1)'s modifying language was applicable to both the verbs "store" and "produce" and because the systems at issue stored numbers that were not randomly or sequentially generated, neither system was an ATDS under the TCPA.

Less than a month later, the Seventh Circuit issued its holding in *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020). There, the court determined that a dialing system that neither stored nor produced random or sequential numbers from a generator was not subject to the TCPA. Much like the Ninth and Eleventh Circuits, the court undertook an exhaustive assessment of Section 227(a)(1) and identified four potential interpretations of what qualified as an ATDS. The court ultimately adopted the reasoning of the Third and Eleventh Circuits, finding that "using a random or sequential number generator," as stated in Section 227(a)(1), modified both "store" and "produce" and that such a "interpretation is certainly the most natural one based on sentence construction and grammar." *Gadelhak*, 950 F.3d at 460, 464. The court further rejected the Ninth Circuit's reasoning in *Marks* as rewriting the legislation and cautioned that such a reasoning would "create liability for every text message sent from an iPhone." *Id.* at 467.

Enter the Second Circuit. On April 7, 2020, the court issued its holding in *Duran v. La Boom Disco, Inc.*, 955 F.3d 279 (2d. Cir. 2020), an appeal concerning promotional text messages sent through a mass messaging system to telephone numbers that were submitted by recipients or through other direct input. The court interpreted Section 227(a)(1) broadly finding that Congress did not intend that stored numbers within a dialing system be generated randomly or sequentially to qualify as an autodialer. Rather, that modifying section of the statute applied only to numbers that were produced. That is, the Second Circuit found that the comma in Section 227(a)(1) modified only the second verb, "produce," and did not modify or limit the verb "store." The court rejected the more narrow approach as creating "surplusage" within the TCPA, creating inconsistency in other exceptions within the Act and conflicting with FCC instructions to interpret the TCPA broadly.

What Lies Ahead?

A starkly defined circuit split now exists among five courts concerning what constitutes an autodialer under the TCPA. This dispute will require resolution either through further Congressional action, FCC interpretation or Supreme Court guidance. The most likely source for immediate relief appears to be through judicial review. Currently, a Ninth Circuit petition for writ of certiorari is before the Supreme Court seeking review of two issues: whether the TCPA violates First Amendment protections and whether the ATDS definition advanced in *Marks* is appropriate. *See Facebook, Inc. v. Duguid, et al.*, Case No. 19-511. The *Facebook* petition was filed before the Eleventh, Seventh and Second Circuits issued their rulings in 2020 and those, presumably, increase the potential that the Supreme Court will grant certiorari. Even if the Court declines to review the issues as presented in *Facebook*, treatment of this issue within other circuits will only serve to further entrench this circuit split and will provide additional grounds for review. It is also worth noting that the Supreme Court will be holding oral arguments in May 2020 in *Barr v American Association of Political Consultants Inc.*, Case No. 19-631. Although the definition of an ATDS is not before the Court there, there is a challenge to the overall constitutionality of the TCPA before the Court. While a wholesale invalidation of the TCPA is not expected, some litigants across the country have obtained stays of TCPA litigations pending a ruling in *Barr*.

Until definition of an ATDS is resolved, those whose marketing and communication efforts involve the use of dialing systems should be cautious of where their activities originate from and are directed. As it stands, the threshold and scope for a TCPA violation involving an ATDS is much lower and drastically broader in the Ninth and Second Circuits. The Ninth Circuit has seen an increase in TCPA litigation following the ruling in *Marks* in 2018 and it expected that the Second Circuit may see a similar increase following the ruling in *Duran*.

Andrew Sayles is a Partner with Connell Foley LLP in Roseland, New Jersey. His practice includes class action defense, consumer financial services litigation, professional liability defense and appellate advocacy. Andrew is a DRI Member where he serves on the Class Action Substantive Law Group for the Commercial Litigation Committee and as Philanthropic Activities Chair for the Professional Liability Committee. He is Program Chair for the Brennan-Vanderbilt Inn of Court and was named a New Leader of the Bar by the New Jersey Law Journal in 2019.

Coronavirus and State of Alarm in Spain

Force Majeure and *Rebus Sic Stantibus*

By Santiago Nadal

COVID-19 is causing a crisis in Spanish economy. The Spanish Government has issued new rules, to alleviate the emergency situation. This is affecting the Spanish contracts too.

Obligation to Respect the Terms Agreed. Contractual Liability

Article 1101 of the Spanish Civil Code regulates contractual liability. Article 1124 permits the termination of bilateral obligations due to a breach by one of the parties. The parties to a contract are obliged to respect its terms and their contractual obligations. The party that breaches a contract is subject to contractual liability (Art. 1101 of the Spanish Civil Code). It is obliged to compensate the other party, for the damages suffered due to said breach.

Force Majeure

Article 1105 of the Spanish Civil Code establishes force majeure as an exemption from liability.

What is Force Majeure in Spain?

However, the parties are not liable, if the breaches were caused by force majeure. Force majeure is an unpredictable or inevitable event (Art. 1105 Civil Code).

The Spanish Supreme Court has defined what is an "unpredictable" or "inevitable" event. In its Decisions of 6th April 1987 and 11th May 1983, the Supreme Court defines what is Force Majeure. Events that are:

> Unavoidable or that need ... an exorbitant forecasting, to which nobody is obliged.
>
> Unpredictable ... Forecasting does not need to exceed the normal faculties of the average person.

Traditionally, Force Majeure has been applied in Spain to natural disasters or third party's human actions or governmental decisions that are out of control by the parties to the contract.

The concept could be applied to the present situation. A pandemic which is out of control and causes a national / global health emergency. It causes a general disruption of industry and commerce and has forced the national governments to paralyze the normal activity of our societies. For example, the Spanish Government has declared a very strict "State of Alarm."

Is Force Majeure Addressed in the Contract?

The COVID-19 pandemic in Spain and the State of Alarm could be Force Majeure for Spanish courts. One of the parties to the contract cannot respect its obligations, due to inevitable and unforeseen facts.

International contracts frequently contemplate / regulate the possibility of Force Majeure. They normally establish

the suspension or the termination of the contract, and the financial consequences. Similarly, the parties may exclude the effect of Force Majeure. In these cases, the parties shall simply apply the contractual provisions

If Force Majeure is not specifically addressed in the contract, the previous Case Law will be applied, including the option of terminating the contract, if it is impossible for a party to respect its obligations, or it is an exorbitant burden.

Article 1105 of the Spanish Civil Code establishes that nobody is liable for facts that could not be foreseen or that were unavoidable. Article 1184 establishes that debtor will be free of its obligations, when they become physically or legally impossible. In these Force Majeure cases, the party in the contract being freed of its obligations should return any consideration it received from the other party, in accordance with the Spanish Supreme Court's Decision of 22 December 2014. A breach of contract may cause its termination, according to Article 1124 of the Civil Code … Even if debtor is not liable for its breach of contract, due to force majeure, compliance with the contract would be substantially altered, with a great negative effect for the other party, who may claim back the part of the price already paid.

Essential Changes in Circumstances

Even if COVID-19 or the State of Alarm are not considered as Force Majeure, they would, at least, be considered as essential changes in the circumstances of the contract.

Rebus Sic Stantibus

Spanish Supreme Court has frequently decided that changes in the important / essential circumstances of the facts around a contract, may lead to a change in the obligations of said contract. The mutual obligations of the parties are fixed in the agreement, *rebus sic stantibus*, "while these are the circumstances." If they are modified, the obligations of the parties should be adjusted to the new conditions.

This is an Equity rule accepted by the Spanish Supreme Court that parties tied by long-term contracts can seek an adjustment in their obligations if:

(i) Circumstances have extremely changed, from the moment when the contract was signed, to the time of fulfilling the obligations; and

(ii) As a consequence, the contract is excessively burdensome for one of the parties; and

(iii) Said new circumstances were not predictable; and

(iv) The parties have no other remedy to cure the new situation; and

(v) It is not reasonable that the obliged party remains subject to its previous obligations as such.

This extraordinary modification of the contract's circumstances, or *rebus sic stantibus*, may lead to:

- A diminution of the contractual obligations of the party suffering said circumstances; or
- Even to the termination of the contract.

Change in the Business Basis. The Balance of Contractual Obligations

To avoid cases when one party cannot bear its obligations, as such, due to changes in the external circumstances, Spanish Case Law has retorted to another legal concept: the balance of the obligations.

In Spanish Law, contracts need to have a "cause," a "legal reason." This "cause" is what a party to the contract receives from the other: the goods or services; or the price. This combination of two "causes" is the "basis of the contract"; the parties agree on a "balance" between what the give and what they receive.

According to the Spanish Supreme Court, if the circumstances change dramatically, so that this "balance" disappears, the party suffering this new unbalance should obtain redress, to guarantee a new "balance," and his obligations are not excessively burdensome.

Under Article 1105 of the Spanish Civil Code, nobody is liable for facts that could not be foreseen or, if foreseeable, could not be avoided.

In any case, all long-term contracts with obligations affected by the special COVID-19 crisis and / or the Spanish State of Alarm, will need to be reviewed, by the parties and / or by the Spanish Civil and Commercial Courts.

Santiago Nadal is a lawyer in Barcelona, Spain, and the manager of SN ABOGADOS. He created the firm in March 2009. He previously was a partner in the litigation departments of Gómez-Acebo & Pombo and Ernst & Young (Abogados) where he led the Litigation Department. Santiago is a practicing litigator in several Spanish jurisdictions, including Barcelona and Madrid. He works in the following areas: Intellectual Property, Copyright and Software, Distribution and Franchise, and Contractual Liability, Product

Liability and D&O Liability. He is a member of the Defence Research Institute. He has been member of the Board of the Barcelona Bar and President of the Competition Law and IP Section.

COVID-19 and University Closures

What Institutions Can Expect as Students File Class Actions Against Them

By Eric Samore, Ronald Balfour, and Michael Chang



Colleges and universities across the nation have been forced by the COVID-19 pandemic to close their physical classroom doors and open up virtual ones. While these schools are trying to make the best of a bad situation, students are filing class actions in droves and sending a clear message: having paid for the full campus experience, they feel short-changed by the transition to remote learning.[1] Colleges and universities must be prepared to defend themselves by challenging both the merits of these suits and the propriety of class certification.

The Benefit of the Bargain

Generally speaking, students suing their schools based on their COVID-19 response allege they were deprived of the benefit of their bargain with schools—paying tuition and fees, and then losing the benefits of in-class learning, on-campus housing, events and activities, and other facilities and services, such as gyms, libraries, and student health centers. These students are typically seeking pro-rated refunds of the portion of tuition, on-campus housing, and meals attributable to the part of the academic year that was shifted to a remote setting. They also frequently seek injunctive relief to prevent schools from retaining unused funds.

Past experience suggests that, now that the class action plaintiffs' bar has hit on a possible theory of liability against colleges or universities, they will assert that theory against as many schools as possible—regardless of the strength of a particular claim against a particular school. As a result, any college or university that had to transition to remote learning because of the pandemic can reasonably expect a suit for monies paid for the Spring 2020 term.

In Defense of the Institutions

Whether by state stay-at-home or shelter-in-place orders, based on guidance from the Centers for Disease Control[2] or by their own volition, colleges and universities had little choice but to close their doors to protect their students, faculty, and staff. The students bringing these suits have not argued otherwise; to the contrary, students from New York to California have expressly admitted in their pleadings that schools acted appropriately in closing physical campuses.[3] Accordingly, institutions cannot defend themselves by simply saying they did the right thing—plaintiffs bringing these suits already concede as much and account for that in their legal theories. Instead, successfully defending these suits will require less moralizing and more legal nuance.

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[1] *See, e.g., Satam v. Northeastern University*, Case No. 20-cv-10915 (D. Mass. May 13, 2020); *Shoham v. Loyola Marymound University*, Case No. 20-cv-04329 (C.D. Cal. May 13, 2020); *Soriano v. University of New Haven*, Case No. 20-cv-00662 (D. Conn. May 13, 2020); *Student A v. Wagner College*, Case No. 20-cv-02170 (E.D.N.Y. May 13, 2020).

[2] Interim Guidance for Administrators of U.S. Institutions of Higher Education, Centers for Disease Control and Prevention (rev. Mar. 18, 2020), *available at* https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-administrators-college-higher-education.pdf (suggesting Institutions consider "extended in-person class suspension" when there is substantial community transmission—"[i]n collaboration with local public health officials").

[3] *See, e.g., Student A v. The Board of Trustees of Columbia University in the City of New York*, Case No. 20-cv-03208, Dkt. 1 at ¶ 2 (S.D.N.Y. Apr. 23, 2020) ("closing campus and transitioning to online classes was the right thing"); *Brandmeyer v. The Regents of the University of California*, Case No. 20-cv-2886, Dkt. 1 at ¶ 5 (N.D. Cal. Apr. 27, 2020) ("University of California's decision to transition to online classes and to instruct students to leave campus were reasonable decisions to make").

The Pleadings

The first opportunity to attack the legal sufficiency of these lawsuits comes right at the beginning, at the pleading stage. Some schools have successfully defeated claims by pointing out they did not make any *specific* promises they did not keep, meaning there is no breach of contract—these students' general expectations were not sufficient in and of themselves to support their claims.[4] Other schools have successfully moved to dismiss based on defenses such as sovereign immunity.[5]

Summary Judgment

Students whose cases survive the motion to dismiss stage may nevertheless see their claims succumb to summary judgment. At this point, cases about COVID-19 are too new to have reached the summary judgment stage, but it is not difficult to imagine how this might play out. For example, if students tether their contract claims to a warranty that the school put out in advertising materials or handbook, the school might be able to show that the advertisement was not part of the basis of its bargain with the student because the student never saw it or did not make any attendance decision based on it, or based on disclaimer language in the material.[6] Other possible motions for summary judgment could present themselves as well; defending against these novel claims will require analyzing the specific facts alleged to evaluate the soft spot in them.

Class Certification

A denial of class certification is often the "death knell"[7] of the litigation. Predominance is usually the critical battleground when opposing certification under Fed. R. Civ. P. 23(b)(3), and these cases are likely to be no different: just because the named plaintiff has a claim to have been shortchanged doesn't necessarily mean everyone else does, and determining whether each putative class member does may involve individualized inquiries that preclude class certification. The predominance requirement provides that "questions of law or fact common to class members predominate over any questions affecting only individual members[.]" Fed. R. Civ. P. 23(b)(3). When approaching these inquiries, there are critical questions that should be addressed:

- Can injury and damages be proven on a class-wide basis given the diverse composition of a student body (*e.g.*, scholarships, student-aid, part-time students, students enrolled in online programs, advertising material actually seen by each student, etc.)?[8]
- The students are bringing common law causes of action (*i.e.*, seeking to assert breach of contract or unjust enrichment claims on behalf of a nationwide class), but do variations in state law preclude certification under the court's choice of law jurisprudence?[9]
- Are there individualized defenses that can be asserted against class members?[10]

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4 *See Gokool v. Oklahoma City Univ.*, No. CIV-16-807-R, 2016 WL 10520949, at *4 (W.D. Okla. Dec. 29, 2016) (dismissing breach of contract claim because student could not "identify [a] specific service that [the university] agreed to provide her but failed to," instead relying on "broad, policy-driven statements"); *Krebs v. Charlotte Sch. of Law, LLC*, No. 3:17-CV-00190-GCM, 2017 WL 3880667, at *5 (W.D.N.C. Sept. 5, 2017) (dismissing breach of contract claim where the students "do not identify any written contract and provide no meaningful substance (or even the date) of any such alleged agreement.").

5 *See, e.g., Leatherwood v. Prairie View A & M Univ.*, No. 01-02-01334-CV, 2004 WL 253275, at *2 (Tex. App. Feb. 12, 2004) ("The University is a state agency entitled to sovereign immunity.").

6 *See, e.g., Moeller v. Bd. of Trustees of Indiana Univ.*, No. 116CV00446JMSMPB, 2017 WL 6603718, at *17 (S.D. Ind. Dec. 27, 2017) (granting defendant's motion for summary judgment, in part, where basis of claim for breach of contract was a university handbook that stated "Statements and policies in this Handbook do not create a contract and do not create any legal rights ...."); *Packer v. Trustees of Indiana Univ. Sch. of Med.*, 73 F. Supp. 3d 1030, 1041 (S.D. Ind. 2014) ("Because the Academic Handbook explicitly disclaims any creation of a contract, Dr. Packer cannot rely upon these policies as a basis for her breach of contract claim.").

7 *Microsoft Corp v. Baker*, 137 S.Ct. 1702, 1707 (2017).

8 *See Robb v. Lock Haven Univ. of Pennsylvania*, No. 4:17-CV-00964, 2019 WL 2005636, at *12 (M.D. Pa. May 7, 2019) (denying class certification where the named plaintiffs' claims "involve[d] circumstances that are different than some of the individuals in the proposed class," as the class was comprised of a "nebulous bunch [that] . . . might not have a [claim.]").

9 *See Payne v. FujiFilm U.S.A., Inc.*, No. CIV. A. 07-385 GEB, 2010 WL 2342388, at *10 (D.N.J. May 28, 2010) (denying class certification where choice of law analysis revealed, in part, state laws regarding breach of contract "var[ied] greatly with respect to issues such as statutes of limitations, parol evidence, burdens of proof, reliance, and privity," and the plaintiffs had failed to satisfy their burden on certification.); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 371 (E.D. La. 1997) (finding plaintiffs had not carried their burden to provide a solution to address "variations among the fifty-one relevant jurisdictions' . . . breach of contract causes").

10 *See State of W. Virginia ex rel. Miller v. Sec'y of Educ. of U.S.*, No. CIV. A. 2:90-0590, 1993 WL 545730, at *14 (S.D.W. Va.

Defendants that develop and marshal individualized evidence of their defenses will be well positioned to defeat class certification.[11]

Conclusion

While courts have begun providing opinions that lay the framework for a potential motion to dismiss, the landscape for cases that survive those motions remains uncharted territory at this point. As time goes on and courts begin ruling on motions for summary judgment and class certification, those rulings will provide some clarity as to which defenses are most likely to succeed. In the meantime, schools must be prepared to defend themselves in a wide variety of manners, including those listed above if they are supported by the facts of the case. Successful schools will be those who have been careful to create a factual record in support of their merits and certification defenses.

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Sept. 30, 1993) (denying students class certification because of the "unique defenses to which the individual claims of the named plaintiffs are subject to").

[11] See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) ("[A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.").