

Michigan Colleges Alliance:  
COVID-19 Litigation Threats in Higher  
Education



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**Michael Brady**



- Nearly 23 years as a business and class action litigator. Chair's Warner's Litigation and Automotive Groups
- Regularly represents automotive suppliers in contract negotiations and supply chain disputes
- Defends companies in class action cases involving antitrust, consumer and securities fraud

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**Charles Ash Jr.**



- A trial attorney with extensive experience representing businesses in complex contract and tort litigation in state and federal courts
- Successfully represents businesses in high stakes cases

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**Pamela Enslen**

- Counselor, litigator and mediator with extensive experience in employment and commercial litigation
- Provides labor, employment and business advice and policy advice and drafting to universities and colleges
- Represents clients in breach of contract, infringement of proprietary information, wrongful discharge, discrimination, violation of FMLA, ethnic, sexual, religious and gender harassment, free speech, retaliation and more

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**Agenda**

- I. What Are These Suits About?
- II. What Defenses Are Available? – Tuition Based Defenses
- III. What Defenses Are Available? – Room and Board Based Defenses
- IV. What is a Class Action?
- V. What Defenses Are Available? – Class Certification
- VI. How Can You Prepare and Protect Yourself Going Forward?

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**What Are These Suits About?**

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### Nationwide Litigation

- Lawsuits have been filed throughout the country for refunds related to pandemic related changes and closures:
  - Over 100 cases
  - Institutions of all different sizes, public and private, have been targets



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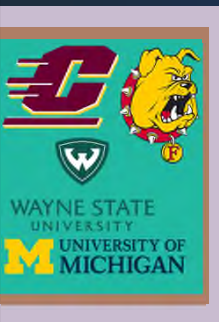
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### Suits Against Michigan Institutions



- University of Michigan
- Michigan State University
- Wayne State University
- Western Michigan University
- Lake Superior State University
- Central Michigan University
- Eastern Michigan University
- Northern Michigan University
- Ferris State University

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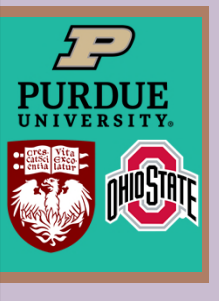
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### Suits Against Institutions in Neighboring States



- Purdue University
- Indiana University
- University of Toledo
- Ball State University
- Ohio State University
- DePaul University
- University of Chicago

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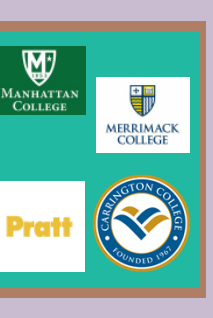
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### Suits Against Private Institutions



- Manhattan College
- Adelphi University
- Brown University
- Barry University
- Pratt Institute
- Marist College
- Wagner College
- Carrington College
- Merrimack College
- Dartmouth College

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### Why Are Plaintiffs Pursuing These Cases?

- Plaintiffs are seeking refunds/deductions for:
  - Tuition
  - Fees
  - Room and Board



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### Causes of Action in Class Actions Against Institutions

- Breach of Contract
- Unjust Enrichment
- Conversion



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## What Defenses Are Available?

Tuition Based Defenses



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## No Contract

- The relationship between a university and its students is not contractual in nature
- Courts have also refused to find a contract based on informational materials



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## No Contract Cont.

- Absent a contractual agreement universities decide:
  - who may teach,
  - what may be taught,
  - how it shall be taught,
  - and who may be admitted to study.

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**No Breach of Contract**

- Even if a contract exists, the university did not breach it:
  - No agreement for face-to-face education
  - The students still received education and credit for the coursework
  - Emergency policies and handbooks incorporated into any contract

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**No Breach of Contract Cont.**

- Force Majeure
  - “force majeure” clauses limit or alter requirements of performance under certain situations outside of the control of the parties including:
    - War,
    - Strike,
    - Weather,
    - Acts of government,
    - Etc.

Executive Order 2020-49 (COVID-19)  
 Executive Order 2020-50 (COVID-19)  
 Executive Order 2020-51 (COVID-19)  
 Executive Order 2020-52 (COVID-19)  
 Executive Order 2020-53 (COVID-19)  
 Executive Order 2020-54 (COVID-19)  
 Executive Order 2020-55 (COVID-19)  
 Executive Order 2020-56 (COVID-19)

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**No Breach of Contract Cont.**

- Performance under any contract was impossible or impracticable
- Students must perform (i.e. pay) because universities substantially performed their obligations under any contract
- Enforcement of any contract would violate public policy

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## No Damages

- Even if a contract exists, the students did not suffer any damages:
- Online Education is not necessarily less valuable than face-to-face education



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## What Defenses Are Available?

Room and Board Based Defenses



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## No Contract

- Did students have written lease agreements?
- Month to Month?
- Term Based?



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**No Breach of Contract**

- How did students leave?
  - Asked?
  - Told?
  - Appeal process?



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**No Breach of Contract Cont.**

- Impossible or impracticable due to health and safety in dormitories
- Force Majeure Clause?



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**What Is A Class Action?**



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### What is a “Class Action”?

- One or more “named” plaintiffs pursue claims on behalf of similarly situated individuals who are not directly part of the case
- Trial by proxy
- Alternative to similar claims separately filed by many different individuals



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### Why Are Class Actions Concerning?

- Large combined exposure to liability
- Motivated plaintiffs' attorney with a stake in the outcome
- Significant distraction
- Costly defense
- Bad publicity



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### How Does a Suit Become a Class Action?

- A class action must be certified. The court must decide that:
  - A class action is the best way of pursuing plaintiffs' claims
  - The named plaintiff(s) is appropriate to represent the class(es)

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## Class Certification

- Class certification can make or break a case.
- If a class isn't certified, the claim usually ends.
- If a class is certified, parties often settle.



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## How Does a Suit Become a Class Action?

- Numerosity
- Commonality
- Typicality
- Adequacy
- Superiority



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## What Defenses Are Available?

Class Certification



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**Class Certification Defenses**

- Attack the merits of the particular plaintiff's claim
- Show individualized issues predominate over common issues
- Show named plaintiffs' interests are atypical of class
- Named plaintiffs must also be able to adequately represent the class

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**Class Certification Defenses**

- Demonstrate challenges of class wide evidence
- Demonstrate how a class trial would result in "mini trials"
- Consider settling with or "picking off" the named plaintiff.



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**How Can You Prepare and Protect Your Institution Going Forward?**



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### What Colleges Can Do Now to Prepare

- Review Contracts and Leases
- Designate a "point person" for complaints and inquiries
- Review advertising and informational material
- Be careful regarding statements on quality of face-to-face education versus online education



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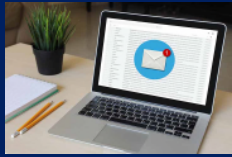
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### What Colleges Can Do Now to Prepare Cont.

- Gathering communications
- Prepare a timeline
- Identify relevant materials



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### What Colleges Can Do Now to Prepare Cont.

- Review insurance contracts for potential coverage
- Work with your financial department to determine potential liability and exposure



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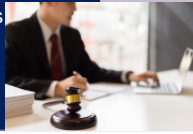
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### What to Do if a Lawsuit is Filed Against Your Institution

- Retain outside counsel
- Collect information and data on the named plaintiff(s)
- Consider whether a common interest agreement with other institutions is appropriate



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### Preventing Litigation in the Future

- Revise materials to indicate that institution shall have complete discretion over the manner and location of teaching
- Update any written agreements as necessary
- Consider Liability Waivers



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### Questions?



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### Upcoming Warner Webinars

- **June 10** - Health and Welfare Plans: Legal and Strategic Issues
- **June 11** - The New Normal and What's Next for Retirement Plans
- **June 11** - Updated Safeguards Requirements as Michigan Reopens
- **June 15** - Small Business Bankruptcy and Michigan Receiverships: Restructuring Alternatives in the Time of COVID-19

**Visit**  
[wnj.com/About-Us/COVID-19-Updates](http://wnj.com/About-Us/COVID-19-Updates)  
 for Warner's COVID-19 legal resources  
 (Question of the Day, eAlerts, webinars)

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### Warner Resources

- WNJ COVID-19 Resource Center:  
<https://www.wnj.com/About-Us/COVID-19-Updates>
- Subscribe to legal updates by emailing:  
[covid@wnj.com](mailto:covid@wnj.com)

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## Thank you!



# COVID-19

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