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COMMENTARY

# College, COVID and Compensation: Who Pays for the Loss of In-Person Classes?

Elisa Reiter and Daniel Pollack | May 8, 2024

When COVID-19 hit, thousands of college students were forced to switch from attending classes in person to receiving an online education. In the eyes of many, they got shortchanged. Colleges and universities argued that they were permitted to change any part of their mode of course delivery due to circumstances beyond their control. Was the difference significant enough to lead to a legally required prorated tuition refund? The Texas Supreme Court recently wrestled with a class action suit on this issue.

How did the case begin? Luke Hogan, a former Southern Methodist University student, filed suit seeking a refund of tuition and fees for the period of the Spring 2020 semester when SMU offered online classes as part of a government mandate related to COVID guidelines. Hogan filed suit prior to the Texas Legislature enacting the Pandemic Liability Protection Act (PLPA). The PLPA protects schools from individuals seeking damages in the form of monetary compensation for changes from in-person classes to online classes occasioned by the pandemic. Justice Jimmy Blacklock empathetically notes:

"Hogan, quite understandably, felt he had been robbed of valuable time and experience in the classroom and on the campus at SMU, time and experience for which he paid tuition. He completed his classes online and received his degree, but he was unable to do so in the enlivening in-person environment that both he and SMU had anticipated would be available."

While a federal district court dismissed Hogan's claims, on appeal to the U.S. Court of Appeals for the Fifth Circuit, the Fifth Circuit certified the issue of whether the PLPA violates Article 1, Section 16 of the Texas Constitution to the Texas Supreme Court. The certified issue revolved around the following clause, which provides in pertinent part:

"Sec. 16. Bills of Attainder; Ex Post Facto or Retroactive Laws; Impairing Obligation of Contracts. No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."

This version of the Retroactivity Clause remains as enacted in 1876. The Texas Supreme Court held that the PLPA does not violate Article 1, Section 16 of the Texas Constitution, as the term "retroactive" has not

been subjected to a literal interpretation. Why? Hogan had no reasonable expectation that his claim against SMU would be satisfied, due in part to the common-law impossibility doctrine. Blacklock opines:

"We must acknowledge that Hogan and his classmates—along with millions of other students—were denied valuable education and experience because of the extraordinary circumstances of the spring of 2020. But who do we, as a society, hold responsible for that injury, if anyone? And what personalized recourse, if any, can we afford to individual claimants for the various harms that everyone suffered, in one way or another, under the difficult circumstances we endured during the most notorious year in recent memory?"

Blacklock adds that "the world was broken." Nothing in our collective memory compares to the shut down of March 2020, unless an individual perhaps had a grandparent or great grandparent still living who had survived the flu epidemic of 1918-1919, who could share their memories.

The PLPA, set out in the Texas Civil Practice and Remedies Code, provides protection for claims as follows:

"An educational institution is not liable for damages or equitable monetary relief arising from a cancellation or modification of a course, program, or activity of the institution if the cancellation or modification arose during a pandemic emergency and was caused, in whole or in part, by the emergency."

Blacklock acknowledges that the Texas Supreme Court's precedents as to what constitutes a retroactive law is best analogized to "a tangled wad of

Christmas lights pulled from the attic after Thanksgiving." Blacklock cites a 2003 Texas Supreme Court case: "A law that does not upset a person's settled expectations in reasonable reliance upon the law is not unconstitutionally retroactive." In addition:

"The common law has never faulted a contracting party whose performance is rendered impossible by either an Act of God or an act of government. The coronavirus crisis was surely both, at least in the spring of 2020 when government orders specifically prohibited in-person higher education."

Here, there was no settled expectation of recovery. Hogan presents no authority for compensation from a school for closure for any reason, let alone government mandated closure. Blacklock concludes: "In Hogan's case, there were no settled rules governing a student's ability to recover damages from a university when the government forces the school to move online during a pandemic. That game had never been played before." SMU emerges victorious. Hogan may not have had the benefit of in-person classes, but he did have the right to attend classes via the internet, as did millions of other students impacted by COVID. Consequently, Hogan will receive no compensation for enduring the many changes that millions of other students experienced.

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