

**Professional Perspective**

# **Class Certification in College Tuition Refund Class Actions**

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# Class Certification in College Tuition Refund Class Actions

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Within weeks of the Covid-19 pandemic striking the U.S. in spring 2020, a large number of class action suits were filed on behalf of customers demanding refunds. Customers filed suit against major airlines, colleges and universities, festivals and other events, and membership services such as gyms. The university and college tuition refund claims are more complex than most of these proposed class actions. Universities and colleges did not cancel services completely like other businesses, but closed campuses and moved courses online in the middle of the spring semester or quarter.

This article explores the significant hurdle plaintiffs seeking tuition refunds will face at the class certification stage of proving that a formulaic method exists to determine injury without the need for individualized inquiry.

## College Tuition Refund Class Actions

By summer 2020, class action lawsuits had been filed against more than 100 colleges and universities, including Columbia, Harvard, Penn State, and University of Southern California, to name a few. Nearly all the suits assert claims for breach of contract and unjust enrichment. In general, the complaints do not allege that schools were wrong to close campuses; instead, they allege that an online education is not worth as much as the in-person version. A [complaint](#) against Boston University, for instance, alleged that “the value of any degree issued” on the basis of online classes would be “diminished for the rest of their lives.”

The plaintiffs’ main theory of harm focuses on the idea that students paid for an in-person education and received something inferior in its place. According to the [complaints](#), an in-person education encompasses a number of experiences that the online version does not, including face-to-face interaction with faculty and other students, access to physical facilities such as libraries and labs, student government and unions, extra-curricular activities, and the social development that results from being on campus. As a consequence, a switch to online education requires that universities pay students a partial refund of paid tuition fees, the plaintiffs assert.

## Class Certification Requirements

Economic analysis is frequently used in the class certification phase of antitrust cases to assist courts in determining whether the requirements of Rule 23 of the Federal Rules of Civil Procedure are met. One of the requirements of Rule 23 is that plaintiffs establish that common issues predominate over individual issues, and that a class action is superior to available methods for adjudicating the dispute.

Economic analysis can be helpful to courts in answering a key question on the issue of predominance: Does a formulaic method exist that can be used to determine injury and damages without the need for individualized inquiry? The more subjective the nature of damages, the greater the likelihood that a formulaic damages method may not exist, and that individualized inquiry may be needed. In the context of tuition refund matters, the relevant question is: How subjective and individualized are students’ valuations of the in-person aspect of a college education?

## Tuition Refund Damages

An analysis of tuition refunds requires an understanding of the services students receive in exchange for paying tuition fees. These include but are not limited to the ability to fulfill degree requirements, actual learning through coursework, the in-person experience of being on campus, and the importance of the degree for future opportunities.

Students may have different valuations of the various aspects of a college education because students themselves differ in many ways. Students at a particular college or university—members of the same proposed class—are likely to be enrolled in different degree programs, in different years of study, and potentially paying different costs of attendance, taking into account scholarships and financial aid. More importantly, even students similar on all those counts are likely to have varying valuations of the different aspects of a college education.

Any approach to damages requires that plaintiffs define precisely what the world would have looked like but for the alleged wrongful act. According to plaintiffs, the wrongful act is not that universities moved from on-campus education to online, but that they did not reduce tuition fees to account for the alleged inferiority of an online education.

Some of the complaints allege that, prior to the pandemic, many universities already offered online versions of the on-campus programs at a lower cost. The [complaint](#) against Columbia University points out that pre-pandemic, the tuition for an on-campus undergraduate degree in social work at Columbia University was \$58,612 a year, and the cost of the online version of that same degree was \$48,780 a year. Plaintiffs imply that the difference of roughly 17% represents a “premium” for the on-campus version over the online one.

However, many of the courses and programs that went online during the pandemic might never have been offered online in the past, making such calculations impossible for many members of the proposed classes. Defendants are also likely to challenge this approach by pointing out that market conditions—both supply and demand—before and during the pandemic are significantly different, making a comparison of pre-pandemic prices to prices during the pandemic an apples-to-oranges comparison.

Before the pandemic hit, the business model and rationale behind online courses may well have been different from traditional in-person education. During the pandemic, however, universities offered online courses as a replacement for the in-person version, not as an alternative, potentially indicating a convergence in cost and demand factors. Any comparison of online to in-person education from before the pandemic would also have to account for changes in online education offered during the pandemic.

To the extent that online courses offered during the pandemic were superior to online courses pre-pandemic—in terms of the faculty offering the courses, the technology being used, and so on—any analysis would have to account for that. Finally, there was a dramatic upward shift in demand for online courses during the pandemic, and higher demand, all else equal, results in higher market prices. In other words, the analysis cannot simply assume that any “premium” paid by students for an in-person education pre-pandemic will be the same during the pandemic.

## Is There a Formulaic Approach?

Plaintiffs will likely have to provide a deeper analysis of the alleged difference in value between the in-person and online versions of education during the pandemic. Plaintiffs’ experts might look to borrow from approaches used elsewhere. One area of litigation in which plaintiffs have previously had to evaluate harm based on consumers’ subjective valuations of a component of a product or service is false advertising. For instance, when claiming a food product was sold with a false label such as, say, “all natural,” plaintiffs are required to put forth a formulaic method to determine harm due to the higher price the defendant was allegedly able to charge by using the false label—the “price premium” consumers paid.

In such cases, plaintiffs’ experts have proposed two methodologies: hedonic regression analysis and conjoint survey analysis. Both methods are based on the economic concept that a product or service is made up of various components or features, and that the price of the product is the sum of prices of its components. In the context of tuition refund claims, the feature at issue might be the in-person or on-campus “feature” of the college education service.

Hedonic regression analysis has been proposed as a method to extract individual product attribute values using data on actual sale price and quantities of products comprised of varying features, and any economic factors that may influence price. However, hedonic analysis is data-intensive, and given that there is not a long history of prices and quantities of types of college tuition sold in the unusual economic environment caused by the pandemic, such an analysis is likely to be infeasible here. Moreover, the economic conditions for hedonic regression analysis to be reliable typically do not hold in the case of highly differentiated, branded products or services such as college education.

Plaintiffs’ experts in false advertising matters have also proposed conjoint survey analysis as a method to determine consumer valuations of individual product features. In a conjoint survey, respondents are asked to choose between multiple hypothetical product options, each with a different combination of product attributes, including price. Each respondent is typically presented with multiple sets of choices, and the survey data is used to determine the average consumer’s willingness to pay for the individual product features.

However, in several cases, courts have found the conjoint survey method to be insufficient because consumer willingness to pay is not a measure of the actual harm to consumers, which must equal the difference between the price consumers paid for the product with the false label and the price they would have paid for the product without it.

In *Morales v. Kraft Foods*, plaintiffs [alleged](#) that Kraft misled consumers by using the term “natural cheese” in the labeling of a cheese product that contained an artificial coloring. First Amended Complaint, *Morales v. Kraft Foods*, No. 2:14-cv-

04387-JAK-PJW (C.D. Cal., Oct. 14, 2014). The court decertified the class because it concluded that “conjoint analysis conducted by [the plaintiffs’ expert] did not measure the market value of the product either with the ‘natural cheese’ label or without it.” Civil Minutes, *Morales v. Kraft Foods*, No. 2:14-cv-04387-JAK-PJW (C.D. Cal., June 9, 2017).

The court cited the decision in *Saavedra v. Eli Lilly & Co.*, [2014 BL 368512](#) (C.D. Cal. Dec. 18, 2014), to point out that conjoint analysis only looks to the demand side while ignoring supply. Consumer willingness to pay is only one side of the market forces that ultimately determine price and market value, and supplier decision-making is the other.

Moreover, in the context of college tuition, the on-campus experience is difficult to define, making conjoint survey design a highly subjective exercise. One of the complaints lists at least eight different experiences a student can benefit from on campus, including “face-to-face interaction with students and peers,” “student governance and student unions,” and “social development and independence,” and so on. It is difficult to imagine a survey design that would enable a reasonable determination of students’ willingness to pay for the on-campus feature.

## Implications

At the class certification stage, plaintiffs seeking tuition refunds will face the hurdle of proving a formulaic method exists to determine injury without the need for individualized inquiry. Due to the unique economic situation resulting from the pandemic, pre-pandemic comparisons between online and on-campus tuition likely will not suffice. If plaintiffs propose approaches similar to those used in the false advertising arena—hedonic and/or conjoint analysis—they are likely to encounter similar challenges in courts due to the lack of available market data (hedonics) and the inapplicability of survey methods (conjoint) to determine harm to consumers.

MORE: Read this [Bloomberg Law Insight](#) on tuition refund class actions.