# A Shield for Schools, but No Relief for Students: The Problem with Statutory Immunity in *Dieckhaus v. Board of Governors of the University of North Carolina*[*]

*The law of sovereign and statutory immunity is intended to balance the protection of public institutions with the preservation of individuals' ability to seek redress for breached obligations. But when immunity is applied expansively, particularly in the wake of an unprecedented crisis, courts risk insulating government actors from accountability and denying plaintiffs any meaningful avenue for relief. In Dieckhaus v. Board of Governors of the University of North Carolina, students sought refunds for housing, meal plans, and fees after the UNC System abruptly shifted to remote learning during the COVID-19 pandemic. The North Carolina courts held that both sovereign immunity and a newly enacted statutory immunity provision barred against their claims. The North Carolina Supreme Court affirmed without precedential value, leaving the law unsettled. This piece argues that the decision improperly insulated universities from contractual accountability, retroactively extinguished students' rights, and elevated institutional financial concerns over fairness. It situates Dieckhaus within the national landscape of COVID-19 tuition-refund litigation, critiques North Carolina's application of statutory immunity, and contends that courts' reluctance to rule for students reflects overbroad deference that undermines contractual principles and student protections.*

## INTRODUCTION

At the onset of the COVID-19 pandemic in March 2020, the University of North Carolina ("the University" or "UNC") System required students to leave their campuses but declined to issue complete refunds for housing, meals, and other fees that had been paid in exchange for an in-person education.[1] In *Dieckhaus v. Board of Governors of the University of North Carolina*,[2] several students contended that they had entered into binding contracts with the University and that their abrupt transition to remote learning meant that they no longer received the educational experience they had been promised, constituting breach of contract and unjust enrichment.[3] In response, the Board of Governors of the UNC System[4] argued that these claims were barred both



1. Amended Class Action Complaint ¶ 3, Dieckhaus Bd. of Governors of Univ. N.C., 287 N.C. App. 396, 883 S.E.2 106 (2020) (No. 20-CVS-000564)) [hereinafter Amended Complaint].

2. 287 N.C. App. 396, 883 S.E.2d 106 (2023).

3. *Id.* at 399, 883 S.E.2d at 111.

4. For more information on the University of North Carolina System's Board of Governors, see *Board of Governors*, UNIV. N.C. SYS., https://www.northcarolina.edu/leadership-and-governance/

by sovereign immunity and statutory immunity,[5] citing a law passed by the North Carolina General Assembly in June 2020,[6] one month after the initial lawsuit was filed.[7] The district court and North Carolina Court of Appeals found that the plaintiffs' claims were barred because UNC had both statutory and sovereign immunity. The Supreme Court of North Carolina considered the case, but rather than providing meaningful guidance, it issued a one-paragraph decision.[8] Because the justices split evenly on whether to affirm or reverse, the court affirmed the lower court's ruling, leaving it "undisturbed" but "without precedential value"[9]—a result that offered little clarity or resolution.

This decision unfairly shielded universities from contractual liability, retroactively stripped students of their legal claims, and set a dangerous precedent of prioritizing institutional financial stability over fundamental principles of fairness and accountability. To demonstrate how, Part I of this Recent Development focuses on the background of this case and details the North Carolina Court of Appeals analysis of the plaintiffs' claims for breach of contract and unjust enrichment. Part II explores how other institutions have handled similar cases stemming from the pandemic. Part III argues that North Carolina's reliance on statutory immunity was misguided. Finally, Part IV investigates why North Carolina's courts, among others, have been reluctant to rule in favor of students and argues that fears of widespread litigation and concerns about universities' financial stability should not outweigh principles of fairness and accountability.

## I. BACKGROUND

The defendant, the Board of Governors of the University of North Carolina System, oversees a network of seventeen public universities across North Carolina.[10] As a precondition to enrollment for the Spring 2020 Semester, students were required to pay tuition, with the amount of tuition dependent on the type of program they selected.[11] The enrollment options

board-of-governors [https://perma.cc/8G95-HDDC].

5. Sovereign immunity is a state's immunity from lawsuits unless the state consents to being sued. Trey Allen, *Immunity of the State and Local Governments from Lawsuits in North Carolina*, *in* NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK 1, 2 (Shea Denning ed., Univ. N.C. Sch. Gov't, 2015), https://benchbook.sog.unc.edu/civil/immunity-state-and-local-governments [https://perma.cc/68EF-FCUT]. Statutory immunity is legal protection granted by statute that shields certain public officials or employees from liability or lawsuits under specific circumstances. *Id.* at 12.

6. *Dieckhaus*, 287 N.C. App. at 401, 883 S.E.2d at 113 (referring to Act of June 25, 2020, ch. 70, 2020 N.C. Sess. Laws 376–77 (codified at N.C. GEN. STAT. §§ 116-310–13)).

7. *See id.* at 398 n.1, 883 S.E.2d at 111 n.1.

8. Dieckhaus v. Bd. of Governors of Univ. N.C., 386 N.C. 677, 908 S.E.2d 813 (2024).

9. *Id.* at 677, 908 S.E.2d at 814.

10. *Dieckhaus*, 287 N.C. App. at 398, 883 S.E.2d at 111; *Board of Governors*, *supra* note 4.

11. *Dieckhaus*, 287 N.C. App. at 398, 883 S.E.2d at 111.

included an in-person "hands-on" program or a fully online "distance learning" program.[12]

The UNC System marketed these two types of programs differently on its website, notably highlighting the benefits of on-campus, in-person education through promises and references to the campus experience.[13] The plaintiffs paid the associated tuition, which was higher than for online programs, and additional fees for being on campus, such as fees for "the right to reside in campus housing and for access to a meal plan providing for on campus dining opportunities."[14]

On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic.[15] Governors swiftly signed executive orders closing all K-12 public schools,[16] and Governor Roy Cooper of North Carolina was no outlier.[17] Importantly, over 1,400 colleges and universities in the United States also "closed their doors and transitioned to online instruction" in the three weeks that followed the declaration.[18] The defendant in this case issued a systemwide directive to all universities in the UNC System requiring that they transition to online instruction no later than March 23.[19] When the defendant closed campus residences, dining facilities, and athletic centers, the plaintiffs found themselves deprived of the on-campus experience and prevented from utilizing the services that they had paid for.[20] Even where a school within the UNC System offered "some" refunds, those refunds were inadequate and arbitrary.[21]

12. *Id.*

13. *Id.*

14. *Id.* at 399, 883 S.E.2d at 111 (quoting Amended Class Action Complaint ¶ 76, *Dieckhaus*, 287 N.C. App. 396, 883 S.E.2 106 (No. 20-CVS-000564)).

15. Qiyue Cai, Samantha LeBouef, Marjorie Savage & Jodi Dworkin, *What Happened When COVID-19 Shut Down In-Person Higher Education? Parents Speak Out*, 26 ABOUT CAMPUS 26, 26 (2022), https://pmc.ncbi.nlm.nih.gov/articles/PMC9111897 [https://perma.cc/3UEZ-7MYA].

16. *See generally* Adam Ferrise, *50 States of Coronavirus: How Every State in the U.S. Has Responded to the Pandemic*, CLEVELAND.COM, https://www.cleveland.com/metro/2020/03/50-states-of-coronavirus-how-every-state-in-the-us-has-responded-to-the-pandemic.html [https://perma.cc/47G9-BVJ5] (last updated Mar. 21, 2020, at 14:00 ET) (describing how the governors in the fifty states responded to the pandemic).

17. Joanne Brosh, *How the Pandemic Has Affected NC's Educational System*, UNIV. N.C. CHAPEL HILL: CAROLINA DEMOGRAPHY (Mar. 26, 2021), https://carolinademography.cpc.unc.edu/2021/03/26/how-the-pandemic-has-affected-ncs-educational-system [https://perma.cc/FB75-52RD].

18. *Id.*

19. *Dieckhaus*, 287 N.C. App. at 399, 883 S.E.2d at 111.

20. *Id.*

21. *See id.*; *see also* Brandon Wissbaum, *UNCW Student Sues University for COVID-19 Tuition Refunds*, WECT, https://www.wect.com/2020/05/07/uncw-student-sues-university-covid-tuition-refunds [https://perma.cc/CMQ3-25VU] (last updated May 7, 2020, at 11:44 ET) (alleging in the complaint that, even where the University of North Carolina at Wilmington provided reimbursements, they were inadequate or arbitrary reimbursements that did not fully compensate for the students' loss).

More importantly, the plaintiffs alleged the defendant had no broad policy to refund students for tuition or major student fees.[22]

The plaintiffs' primary claims were founded in breach of contract, but they fell into two distinct categories. First, with respect to housing and meal plans, plaintiffs alleged that the University System forced them to vacate campus while providing, at most, "insufficient and arbitrary refunds."[23] Second, as to tuition and mandatory student fees, the plaintiffs contended that no refunds were issued at all, even though the UNC System had promised and charged for a live, in-person educational experience distinct from its existing online programs. By paying for and attending classes on campus, the plaintiffs argued that they accepted their university's offer of in-person services, and the university breached by closing campus and delivering a "materially different product." [24] According to the plaintiffs, these breaches caused damages amounting to the difference between the fair market value of services they contracted for and what they actually received.[25]

With regard to student fees, housing, and meals, the plaintiffs claimed that the defendant offered services, access, benefits, and programs by specifically describing the nature and purpose of each fee, such as a fitness center fee, campus technology fee, and security fee. [26] The plaintiffs accepted the defendant's offer by paying those fees.[27] The defendant breached by forcing them to move out and by closing campus buildings, such that the plaintiffs no longer received the benefit of the bargain for which they paid.[28]

In the alternative, the plaintiffs asserted an unjust enrichment claim.[29] They maintained that by accepting payment for tuition and fees, the defendant unjustly retained a benefit in exchange for a bargained-for benefit that was not provided to the plaintiffs.[30] The plaintiffs argued that equity required the defendant to return a pro-rata portion of the money paid, especially when considering the savings realized by the defendant from switching to fully online operations.[31] While the plaintiffs did not identify specific savings, they allege that the universities incurred fewer operating expenses, such as reduced costs

22. Wissbaum, *supra* note 21.

23. *Dieckhaus*, 287 N.C. App. at 401, 883 S.E.2d at 112.

24. *Id.* at 400, 883 S.E.2d at 112.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 401, 883 S.E.2d at 112.

29. *Id.* at 401, 883 S.E.2d at 112–13. Unjust enrichment is an equitable principle "to exact the return of, or payment for, benefits received under circumstances where it would be unfair for the recipient to retain them without the contributor being repaid or compensated." Collins v. Davis, 68 N.C. App. 588, 591, 315 S.E.2d 759, 761 (1984).

30. *Dieckhaus*, 287 N.C. App. at 401, 883 S.E.2d at 113.

31. *Id.*

for facilities maintenance, utilities, and on-campus services, during the shutdown.[32]

In June 2020, just over one month after the lawsuit was originally filed, however, the North Carolina General Assembly enacted N.C. Gen. Stat. § 116-311.[33] This statute states in pertinent part that "an institution of higher education shall have immunity from claims" related to "tuition or fees paid to the institution of higher education for the spring academic semester of 2020," if the "claim alleges losses or damages arising from an act or omission by the institution of higher education during or in response to COVID-19, the COVID-19 emergency declaration, or the COVID-19 essential business executive order."[34]

The defendant filed a motion to dismiss on five separate grounds.[35] The defendant argued that (1) N.C. Gen. Stat. § 116-311 provided statutory immunity, preventing the plaintiffs' claims; (2) the plaintiffs' claims were barred by sovereign immunity; (3) the plaintiffs failed to state claims upon which relief can be granted; (4) the plaintiffs failed to allege damages were proximately caused by the defendant; and (5) the plaintiffs lacked standing.[36] The trial court granted the motion to dismiss, though it did not specify the grounds for its decision, and the plaintiffs appealed.[37] On appeal, the plaintiffs argued that the trial court erred in dismissing their claims, asserting that they adequately pled both breach of contract and unjust enrichment claims.[38] They also contended that sovereign immunity did not bar their claims, N.C. Gen. Stat. § 116-311 is unconstitutional and inapplicable to their case, and they had standing to bring their claims.[39]

### A. *Sovereign Immunity*

The North Carolina Court of Appeals first considered whether sovereign immunity barred the plaintiffs' claims: a threshold issue that applies to both the contract and unjust enrichment theories. Sovereign immunity is a longstanding doctrine that prevents the State, including its agencies, from being sued without

32. Amended Complaint, *supra* note 1, ¶ 211.

33. An Act to Provide Immunity for Institutions of Higher Education for Claims Related to COVID-19 Closures for Spring 2020, ch. 70, 2020 N.C. Sess. Laws 376, 376–77 (codified at N.C. GEN. STAT. § 116-311(a)(1)–(2)); *UNC Lawyers Argue COVID Shutdown Suit Could Cost $260 Million in Damages*, THE CAROLINA J. (May 13, 2024), https://www.carolinajournal.com/unc-lawyers-argue-covid-shutdown-suit-could-cost-260-million-in-damages [https://perma.cc/Q5LK-R4TP].

34. 2020 N.C. Sess. Laws 376, 376–77.

35. *Dieckhaus*, 287 N.C. App. at 401, 883 S.E.2d at 113.

36. *Id.* at 401–02, 883 S.E.2d at 113.

37. *Id.* at 402, 883 S.E.2d at 113.

38. *Id.*

39. *Id.* at 403, 883 S.E.2d at 114.

its consent.[40] While this immunity is broad, North Carolina courts have long recognized important exceptions. Most notably, in *Smith v. State*[41] the Supreme Court of North Carolina held that "whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract."[42] Writing for the court, Chief Justice Susie Sharp emphasized the policy rationale behind this exception: sovereign immunity, if applied too rigidly, would discourage individuals from entering into contracts with the State by creating an unfair playing field where one party could not be held accountable for breach.[43]

Sovereign immunity applies unless the state clearly waives it, either expressly or by conduct, which is known as an implied-in-fact contract.[44] The Board of Governors qualifies as a State agency, and no explicit contract promising the "normal college experience" existed here. Thus, the plaintiffs argued that the State had implicitly waived immunity by entering an implied-in-fact contract with students who paid tuition and fees in exchange for certain educational services and campus access. As both the breach of contract and unjust enrichment claims rested on this premise, the court addressed each in turn.

### 1. Unjust Enrichment Claims

Regarding unjust enrichment, the court found that because the plaintiffs did not argue on appeal that the defendant waived its sovereign immunity, the issue was "abandoned" under North Carolina's Appellate Rules.[45] Even if the plaintiffs had raised the argument, however, the court emphasized that sovereign immunity still applies to claims based on "quasi contracts" or "implied-in-law contracts," which include unjust enrichment claims.[46] Referencing prior case law, the court explained that such claims, which seek compensation for services rendered to prevent unfairness, do not waive sovereign immunity.[47] As a result, the court upheld the trial court's decision to dismiss the plaintiffs' unjust enrichment claims, reinforcing the principle that sovereign immunity protects government entities from being sued in this context.[48]

40. *See generally* Smith v. State, 289 N.C. 303, 222 S.E.2d. 412 (1976) (explaining the doctrine of sovereign immunity in contract cases).

41. 289 N.C. 303, 222 S.E.2d. 412

42. *Id.* at 320, 222 S.E.2d at 423–24.

43. *Id.* at 320, 222 S.E.2d at 424.

44. *See* Smith v. State, 289 N.C. 303, 320, 222 S.E.2d 412, 423–24 (1976).

45. *See Dieckhaus*, 287 N.C. App. at 406, 883 S.E.2d at 115.

46. *Id.* at 406, 883 S.E.2d at 115–16.

47. *Id.*

48. *Id.* at 406, 883 S.E.2d at 116.

### 2. Contract Claims

For the contract claim to proceed, the court had to find that an implied-in-fact contract existed in this case and that an implied-in-fact contract waived sovereign immunity. In *Lannan v. Board of Governors of the University of North Carolina*,[49] a case involving similar claims related to COVID-19 refunds, the court determined that an implied-in-fact contract could, under certain circumstances, waive sovereign immunity.[50] Relying on the *Lannan* decision, the court in *Dieckhaus* determined that if the plaintiffs did adequately plead the existence of an implied-in-fact contract, then sovereign immunity would be waived.[51] With that issue resolved, the court in *Dieckhaus* then had to examine whether the plaintiffs had indeed sufficiently pled the existence of an implied-in-fact contract.[52]

To adequately plead the existence of a contract, plaintiffs had to demonstrate the existence of an offer, acceptance, and consideration.[53] And with respect to all claims (tuition, student fees, and on-campus housing and meal charges), the court found that the plaintiffs had adequately pled these essential elements.[54] As such, the court concluded that sovereign immunity did not bar the breach of contract claims and proceeded to evaluate them under the statutory immunity framework.[55]

## B. *Statutory Immunity*

The plaintiffs also argued, without success, that N.C. Gen. Stat. § 116-311 is both unconstitutional and inapplicable to their claims.[56] The statute, enacted after the plaintiffs' claim was filed, provides immunity to higher education institutions from pandemic claims.[57] More specifically, institutions of higher education are immune from individual claims related to tuition or fees paid for the Spring 2020 semester under certain circumstances. Therefore, (1) immunity is granted if the institution offered remote-learning options that allowed students to complete their coursework, (2) the claim alleges losses resulting from the institution's actions or omissions during or in response to the COVID-

49. 285 N.C. App. 574, 879 S.E.2d 290 (2022).

50. *Id.* at 595, S.E.2d at 306. This decision came out in October 2022, over six months after the parties in *Dieckhaus* had already submitted their briefs. Docket Sheet at 1–2, *Dieckhaus*, 287 N.C. App. 396, 883 S.E.2d 106 (No. 21-797) (briefs received January 27 and February 28 of 2022).

51. *Dieckhaus*, 287 N.C. App. at 408, 883 S.E.2d at 117.

52. *Id.*

53. *Id.*

54. *Id.* at 409, 883 S.E.2d at 117.

55. *Id.* at 412, 883 S.E.2d at 119.

56. *Id.* at 412, 426, 883 S.E.2d at 119, 128.

57. N.C. GEN. STAT. § 116-311(a).

19 pandemic, and (3) those actions were reasonably related to protecting public health or safety.[58]

The plaintiffs challenged the applicability of the statute, arguing that its plain language was aimed at providing immunity for tort claims, not for breach of contract or unjust enrichment.[59] They contended that the defendant's refusal to provide refunds was neither a tortious act nor closely connected to the public health purposes underlying the legislation.[60] Rejecting these arguments, the court adopted a broader reading of the statute's plain language, finding that "any" claim or cause of action is barred, whether or not a tort.[61] This definition necessarily includes contract claims and unjust enrichment claims, so the court found that the statute was applicable.[62]

In addition to disputing the statute's applicability, the plaintiffs challenged its constitutionality on several grounds.[63] First, they argued that the statute violates the Contract Clause of the U.S. Constitution, which states that, "[n]o State shall . . . pass any . . . law impairing the Obligation of Contracts . . . ."[64] The plaintiffs claimed that the statute impaired existing contractual obligations by preventing the enforcement of claims for refunds and that the statute interfered with the contracts between the students and higher education institutions.[65] Second, the plaintiffs asserted that the statute violates the Equal Protection Clause of both the United States and North Carolina Constitutions by providing immunity only to certain entities, thus creating discriminatory distinctions without a legitimate governmental purpose.[66] Third, the plaintiffs argued that the statute violates the Due Process Clauses of both constitutions because it denied them their right to seek redress in court.[67] Fourth, they claimed that the statute constitutes an unlawful taking of private property under the Takings Clause of the Fifth Amendment, as it prevents them from recovering money they believe was rightfully owed.[68] Finally, the plaintiffs argued that the statute intrudes upon the separation of powers doctrine, asserting that it was enacted specifically to influence the outcome of pending litigation by directing courts on how to adjudicate the case.[69]

58. *Id.*
59. *Dieckhaus*, 287 N.C. App. at 412–13, 883 S.E.2d at 119–20.
60. *See id.* at 413, 883 S.E.2d at 120.
61. *Id.* at 414, 883 S.E.2d at 120.
62. *Id.*
63. *Id.* at 416, 883 S.E.2d at 122.
64. *Id.* (quoting U.S. CONST. art. I, § 10, cl. 1).
65. *See id.*
66. *Id.*
67. *Id.* at 424, 883 S.E.2d at 127.
68. *Id.* at 425, 883 S.E.2d at 128.
69. *Id.*

In evaluating the plaintiffs' constitutional arguments, the court first considered whether the statute violated the Contracts Clause.[70] The court applied a three-part test to assess whether the State's actions impaired contractual obligations.[71] This test asks whether a contractual obligation existed, whether the state's actions impaired the contract, and whether the impairment was reasonable and necessary to serve an important public purpose.[72] The court concluded that while the statute did impair contractual obligations, the impairment was a reasonable and necessary response to the COVID-19 pandemic because the statute allowed for higher education institutions to continue fulfilling their educational missions amidst the crisis, thus serving an important public purpose.[73]

The court upheld the statute, ruling that it did not violate the constitutional provisions related to equal protection, due process, takings, or separation of powers.[74] The court found that the statute's distinctions were rationally related to a legitimate government interest: ensuring the continuity of educational services during a public health emergency.[75] With respect to the Due Process Clause, the court ruled that the State is permitted to create immunities or defenses, and there was a rational relationship between the statute's provisions and the legislature's objectives during the pandemic.[76] As for the Takings Clause, the court found no support in case law for the plaintiffs' claim that they had a right to sue or recover money under these circumstances.[77] Finally, the court rejected the plaintiffs' separation of powers argument, finding no evidence to support the claim that the statute was designed to influence pending litigation or improperly dictate judicial outcomes.[78]

Ultimately, the court concluded that sovereign immunity barred the plaintiffs' unjust enrichment claims while statutory immunity precluded their contract claims.[79] The court held that the immunity statute was constitutionally valid, recognizing the statute's role in facilitating the continued operation of higher education institutions during a global pandemic without exposing them to excessive liability.[80]

The Supreme Court of North Carolina took the case but only issued a one-paragraph decision, essentially stating that the court was tied at three votes to

70. *Id.* at 420, 883 S.E.2d at 124–25.
71. *Id.* at 421, 883 S.E.2d at 125.
72. *Id.*
73. *Id.* at 423, 883 S.E.2d at 126.
74. *Id.* at 426, 883 S.E.2d at 127–28.
75. *Id.* at 424, 883 S.E.2d at 127.
76. *Id.* at 425, 883 S.E.2d at 128.
77. *Id.*
78. *Id.* at 426, 883 S.E.2d at 128.
79. *Id.*
80. *Id.*

affirm and three votes to reverse.[81] Accordingly, the lower court decision was left "undisturbed" but "without precedential value."[82]

## II. HOW HAVE OTHER SCHOOLS PROCEEDED WITH THESE CLAIMS?

The issue of refunds related to the pandemic is not unique to North Carolina. In fact, over 100 class action lawsuits have been filed by students against colleges and universities seeking refunds for tuition, fees, and room and board expenses due to the COVID-19 forced departures.[83] These class actions have unfolded in a variety of ways but mostly through dismissals of the cases or settlement agreements.

Many of these lawsuits have reached outcomes consistent with *Dieckhaus*. For example, a state court in Ohio held that students of The Ohio State University ("Ohio State") were not entitled to refunds following COVID-19-related campus closures.[84] After the university's campus was shut down, Ohio State did not reduce student fees or tuition for online learning.[85] The court found that Ohio State's decisions were protected by "discretionary immunity," precluding students from recovering those costs.[86] Notably, however, the university had already issued refunds for room and board, as well as reimbursements for recreational sports fees.[87]

Similarly, Montana State University ("Montana State") won its appeal in its pandemic tuition refund lawsuit at the Montana Supreme Court.[88] The court found that, even though "the fitness center was temporarily closed, it was maintained, and even though the library was closed, its online services were available."[89] Further, no student at Montana State was entitled to a refund for

81. Dieckhaus v. Bd. of Governors of Univ. N.C., 386 N.C. 677, 677, 908 S.E.2d 813, 814 (2024).

82. *Id.* Justice Barringer did not participate in the ruling of this case. *Id.*

83. Thomas H. Wintner & Mathilda S. McGee-Tubb, *COVID-19 Tuition and Fees Lawsuits: Defending University Practices and Defeating Class Claims*, NAT'L L. REV. (June 26, 2020), https://natlawreview.com/article/covid-19-tuition-and-fees-lawsuits-defending-university-practices-and-defeating [https://perma.cc/CY5D-BBRU].

84. Smith v. Ohio State Univ., 266 N.E.3d 1, 19 (Ohio Ct. App. 2024); Bethany Bruner, *Columbus-Based Appeals Court Says Ohio State Students Not Entitled to COVID Closure Refund*, COLUMBUS DISPATCH (Dec. 30, 2024, at 15:22 ET), https://www.dispatch.com/story/news/courts/2024/12/30/10th-district-appeals-court-ohio-state-university-students-not-entitled-covid-closure-refunds/77326665007 [https://perma.cc/8R53-4E7A].

85. Bruner, *supra* note 84.

86. *Id.*

87. *Id.*

88. Cordero v. Mont. State Univ., 2024 553 P.3d 422, 425 (Mont. 2024); Alex Sakariassen, *Montana State University Wins Appeal in Pandemic Tuition Refund* Lawsuit, MONT. FREE PRESS (Aug. 13, 2024), https://montanafreepress.org/2024/08/13/montana-state-university-wins-appeal-in-pandemic-tuition-refund-lawsuit [https://perma.cc/W3P2-BS6W].

89. *Cordero*, 553 P.3d at 425; Keila Szpaller, *Montana State University Doesn't Owe Students Tuition from COVID-19 Closures*, SPOKESMAN-REV. (Aug. 9, 2024, at 17:33 ET), https://www.spokesman.com/stories/2024/aug/09/montana-state-university-doesnt-owe-students-tuiti/ [https://perma.cc/BWM4-HJMK].

tuition or fees, because "the institution never promised a complete in-person education."[90] While such a promise may not have been made explicitly, the centuries-old tradition of higher education as a predominantly in-person experience reasonably shaped students' expectations and should have been considered by the court.

The case most closely resembling *Dieckhaus* took place in Texas, though it involved a private university. In *Hogan v. Southern Methodist University*,[91] a graduate student sued Southern Methodist University ("SMU") for a tuition refund, contending that, since all of SMU's materials "contain vivid descriptions of students on campus, benefiting from a unique community,"[92] the school failed to uphold its end of the bargain when it sent students home.[93] The Supreme Court of Texas applied the Pandemic Liability Protection Act[94] retroactively—the law was passed ten months after the claim was brought—and blocked any breach of contract claims related to pandemic closures.[95] The court justified its decision by stating that the plaintiff "cite[d] no precedent in which a student . . . has obtained monetary refunds from a school in the event of the campus's unexpected closure for any reason—much less its forced closure at the hand of the government."[96] Given the unprecedented nature of a global pandemic that resulted in nationwide closures, this lack of precedent is hardly surprising. This case is different from *Dieckhaus* and arguably more reasonable because SMU at least gave students "credits" for housing, dining, and parking expenses.[97]

90. *Id.*

91. 688 S.W.3d 852 (Tex. 2024). The procedural posture of this case is complicated. It went back and forth between state and federal court several times before finally landing back at the federal district court for the remaining claims. *History, Hogan v. S. Methodist Univ.*, WESTLAW, https://1.next.westlaw.com/RelatedInformation/Ie56a5d10040711efa9b8cc773796ed0d/kcJudicialHistory.html?originationContext=documentTab&transitionType=History&contextData=(sc.UserEnteredCitation)&docSource=93902fd09b4f4ed2a9a2945a5a313a3c&rulebookMode=fals [https://perma.cc/X8ES-4DSR].

92. Hogan v. S. Methodist Univ., 74 F.4th 371, 373 (5th Cir. 2023).

93. Cameron Abrams, *Texas Supreme Court Hears Arguments on SMU COVID-19 Breach of Contract Lawsuit*, TEXAN (Oct. 26, 2023), https://thetexan.news/judicial/texas-supreme-court-hears-arguments-on-smu-covid-19-breach-of-contract-lawsuit/article_789e2dca-7446-11ee-a7ba-d7f3d6ad2d8c.html [https://perma.cc/JD3U-JPJS].

94. Ch. 528, 2021 Tex. Gen. Laws 1058 (codified at TEX. CIV. PRAC. & REM. §§ 51.014(a), 74.155, 148).

95. *Hogan*, 688 S.W.3d at 862.

96. *Id.*; *see also* Toluwani Osibamowo, *Colleges Don't Have To Refund Tuition Because COVID Moved Classes Online, Texas Supreme Court Rules*, KERA NEWS (Apr. 26, 2024, at 15:08 CT), https://www.keranews.org/education/2024-04-26/covid-lawsuits-lockdown-smu-liability-online-classes-texas-supreme-court [https://perma.cc/3N45-XU9C].

97. *Recent SMU Graduate Sues University Seeking Partial Tuition Refund After Classes Moved Online*, CBS NEWS: TEX. (Aug. 19, 2020, at 21:35 CT), https://www.cbsnews.com/texas/news/smu-graduate-sues-university-partial-tuition-refund-classes-online/ [https://perma.cc/T7RJ-6HC9].

In contrast, some schools have opted to settle COVID-19 refund claims with their students. The Pennsylvania State University, for example, agreed to a $17 million settlement in response to a class action lawsuit for breach of contract.[98] The money will be put in a settlement fund, and students will receive approximately $150 each.[99] Similarly, the Catholic University of America settled its lawsuit for $2 million,[100] while the University of Colorado settled for $5 million.[101] Other universities, including the University of Chicago,[102] Johns Hopkins University,[103] American University,[104] Georgetown University,[105] University of Delaware,[106] and Columbia University,[107] have also settled similar lawsuits over refund claims.

While no court has been willing to hold colleges and universities liable for refunds, a notable case in Arizona struck down a law that immunized doctors and hospitals from claims of negligence related to COVID-19 treatment.[108] In

98. Rebecca Parsons, *Penn State to Refund $17M to Students Affected by COVID, Attorney Says*, ABC 27 (Nov. 22, 2024, at 23:29 ET), https://www.abc27.com/pennsylvania/penn-state-to-refund-17m-to-students-affected-by-covid-attorney-says/ [https://perma.cc/PY5C-9BKU].

99. *Id.*

100. Patrick McDonald, *Catholic University Settles $2 Million Lawsuit over COVID-19 Tuition Refunds*, CAMPUS REFORM (Dec. 8, 2024, at 07:00 ET), https://www.campusreform.org/article/catholic-university-settles-2-million-lawsuit-covid-19-tuition-refunds/26982 [https://perma.cc/2A8X-VEFP].

101. Elizabeth Hernandez, *CU Students Enrolled in Spring 2020 Entitled to Partial Fee Refund after $5M Class-Action Lawsuit*, DENV. POST (Apr. 20, 2023, at 15:36 ET), https://www.denverpost.com/2023/04/19/university-of-colorado-class-action-lawsuit-2020-5-million/ [https://perma.cc/JUC4-C38H].

102. Emmanual Camarillo, *University of Chicago Settles Class-Action COVID Tuition Lawsuit for $4.95 Million*, CHI. SUN-TIMES (May 29, 2024, at 20:39 ET), https://chicago.suntimes.com/coronavirus/2024/05/29/university-of-chicago-settles-class-action-covid-19-tuition-lawsuit-for-4-95-million-education-money [https://perma.cc/KRE4-Y2W3].

103. *Johns Hopkins to Pay Students Back $6M in Tuition for Semester of Pandemic Remote Learning*, UNIV. HERALD (Aug. 1, 2024, at 11:53 ET), https://www.universityherald.com/articles/79155/20240801/johns-hopkins-university-pandemic-tuition-refunds-maryland-lawsuit.htm [https://perma.cc/R9CB-YEX3].

104. Ali Sullivan, *Judge OKs American University's $5.4M COVID Tuition Deal*, LAW360 (May 8, 2024, at 14:36 ET), https://www.law360.com/pulse/articles/1834821/judge-oks-american-university-s-5-4m-covid-tuition-deal [https://perma.cc/6JRC-GY2W (dark archive)].

105. Rihem Akkouche, *Georgetown Tuition Refund Deal Gets Initial Approval*, USA HERALD (July 17, 2024), https://usaherald.com/georgetown-tuition-refund-deal-gets-initial-approval/ [https://perma.cc/J4W5-C2BV].

106. Xerxes Wilson, *University of Delaware Students Could See COVID-19 Payments from Lawsuit. Do You Qualify?*, DEL. NEWS J. (June 16, 2023, at 05:07 ET), https://www.delawareonline.com/story/news/local/2023/06/14/university-of-delaware-students-covid19-lawsuit-payments-settlement-remote-learning/70317763007/ [https://perma.cc/EF6T-RVGD].

107. Jonathan Stempel, *Columbia University to Pay $12.5 Mln to Settle COVID-19 Refund Claims*, REUTERS (Nov. 24, 2021, at 11:18 ET), https://www.reuters.com/world/us/columbia-university-pay-125-mln-settle-covid-19-refund-claims-2021-11-24/ [https://perma.cc/4YRG-HC2F].

108. Howard Fischer, *Ruling: Arizona Law Limiting Pandemic Liability Lawsuits Illegal*, TUSCON.COM (Oct. 25, 2024), https://tucson.com/news/state-regional/government-politics/ruling-

*Roebuck v. Mayo Clinic*,[109] Arizona Court of Appeals found that the law violated the Arizona State Constitution because the constitution does not allow lawmakers to abrogate the right of anyone to recover damages for injuries.[110] The law at issue also extended similar immunity to businesses, religious institutions, and educational institutions, but based on this ruling, the provision would also "appear to have the same constitutional problems."[111] *Roebuck*'s decision marks a significant step toward protecting individuals' rights to seek redress for harm suffered during the pandemic. While the *Roebuck* decision primarily concerned negligence claims, the case offers a glimmer of hope for greater accountability, with Arizona clearly rejecting the notion of blanket statutory immunity.[112]

## III. WHY NORTH CAROLINA GOT IT WRONG

In *Dieckhaus*, the court's reliance on N.C. Gen. Stat. § 116-311 was misguided because it ignores the issue at hand and creates inconsistencies. The statute was designed to protect higher education decisions that were "reasonably related to protecting the public health."[113] The plaintiffs' claims, however, were not about the decision to send students home or about any actions taken in response to the public health crisis. Rather, their claims centered around the failure to refund the money the plaintiffs had already paid for services that were no longer provided. The court essentially concluded that *failing to provide a refund* was "reasonably related to protecting the public health."[114] The court's focus on the legitimate purpose of sending students home ignores the crux of the issue: the failure to fulfill the contract that was entered into when the students paid for in-person services, which were subsequently eliminated without reimbursement.

Furthermore, the statute only applies to higher education institutions, which raises important questions about fairness and consistency. If higher education institutions are immune from claims for refunds due to COVID-19-related closures, then other institutions offering similar services, such as boarding schools, camps, or similar entities, should also be subject to the same immunity. Claims for breach of contract should be treated consistently across all types of institutions. If, for example, a family paid for their child to attend a summer camp in 2020, which had to close due to COVID-19, the camp should

arizona-law-limiting-pandemic-liability-lawsuits-illegal/article_d543dc6a-57cb-11ee-b5fb-932e4cd51dad.html [https://perma.cc/6DT7-5KES (dark archive)].

109. 536 P.3d 289 (Ariz. Ct. App. 2023).

110. *Id.* at 296; Fischer, *supra* note 108.

111. Fischer, *supra* note 108.

112. *Roebuck*, 536 P.3d at 297; Fischer, *supra* note 108.

113. N.C. GEN. STAT. § 116-311(3).

114. Dieckhaus v. Bd. of Governors of Univ. N.C., 287 N.C. App. 396, 415, 883 S.E.2d 106, 121 (2023).

not, and is not, allowed to retain the money, as it failed to provide the agreed-upon services.[115] So why are colleges and universities treated differently? For consistency purposes, they should not be granted immunity from lawsuits while other businesses or institutions are left to defend breach of contract claims.

The timing of the law's passage is also a cause for concern because N.C. Gen. Stat. § 116-311 was enacted after the plaintiffs had already filed their complaint. The Contracts Clause of the U.S. Constitution prohibits states from passing laws that substantially impair contractual obligations.[116] At its core, the clause was designed to prevent legislative favoritism, especially toward particular debtors, by barring states from selectively relieving certain parties of their contractual duties.[117] It exists to ensure that private agreements are not arbitrarily disrupted by legislative action, thereby promoting stability and fairness in economic relationships. These concerns are directly implicated when a law retroactively nullifies contractual claims that have already been filed in court.

Although the U.S. Supreme Court's interpretation of the Contracts Clause became more deferential during the New Deal Era,[118] the Clause continues to offer meaningful protection. While the pandemic, like the Great Depression, may warrant some temporary flexibility, the retroactive application of § 116-311, which extinguishes pending legal claims under existing contracts, goes too far. Unlike the law in *Home Bldg. & Loan Ass'n v. Blaisdell*,[119] § 116-311 is neither narrowly tailored nor limited in duration. Instead, it broadly and permanently eliminated a category of legal rights after litigation had already begun. Moreover, where *Blaisdell* involved state intervention to protect vulnerable individuals from powerful corporate interests,[120] § 116-311 does the opposite: it shields *institutions* from being held accountable by *individuals*. This concern is heightened by the Supreme Court's recognition in *Allied Structural*

115. *See, e.g.*, Christopher A. Sousa, *Orange County Recreation Summer Camp Cancellation; Summer Virtual Enrichment Offerings*, ORANGE CNTY DEP'T ENV'T AGRIC., PARKS & RECREATION (2020), https://www.orangecountync.gov/CivicSend/ViewMessage/message/113743 [https://perma.cc/Y3G5-B3UR] (both describing full refund policies in light of no longer being able to hold summer camps in North Carolina).; Press Release, Cancellation of Family Day Summer Camp 2020 due to COVID-19, FAMILY DAY CARE SERVS. (June 5, 2020), https://familydaycare.com/cancellation-of-family-day-summer-camp-2020-due-to-covid-19 [https://perma.cc/YL42-WYU2] (same).

116. U.S. CONST. art. I, § 10.

117. *See generally* CONSTITUTION ANNOTATED, *ArtI.S10.C1.6.1 Overview of Contract Clause*, CONGRESS.GOV, https://constitution.congress.gov/browse/essay/artI-S10-C1-6-1/ALDE_00013037 [https://perma.cc/C7NH-CDZJ] (explaining the history of the Clause's enactment).

118. *Id.* See Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447–48 (1934), as an example of this deference. The Court upheld the Minnesota Mortgage Moratorium Law, which temporarily extended the time homeowners had to redeem foreclosed properties. *Id.* The Court found it permissible because it was narrowly tailored, limited in duration, and aimed at addressing an unprecedented economic emergency. *Id.*

119. 290 U.S. 398 (1934).

120. *Id.* at 422.

*Steel Co. v. Spannaus*[121] that impairments of a state's own contracts warrant more stringent examination under the Contracts Clause than impairments of purely private agreements.[122] When a state university seeks to escape liability for its contracts through retroactive legislation, the need for judicial scrutiny is especially pressing.

Thus, the core issue here is one of fairness. While few could have predicted the pandemic's full scope or its impact on higher education, the reality is that students paid for a materially different experience than the one they received. The disruption of on-campus learning was unavoidable but that does not excuse the failure to refund students for services they could no longer access. Students who chose the online program at the outset received the same remote education at a lower cost than those who had paid for the full in-person education and who were left with no recourse.

It is not unheard of for courts to consider fairness in contract disputes. Indeed, courts have long recognized fairness as a central concern in adjudicating them. In *Williams v. Walker-Thomas Furniture Co.*,[123] for example, the D.C. Circuit refused to enforce a contract that was so one-sided as to be unconscionable, emphasizing that the law will not allow parties to be unfairly deprived of meaningful remedies.[124] Just as the *Williams* court insisted that private contracts cannot strip weaker parties of all protection, so too should other courts refuse to uphold a statutory scheme that leaves displaced students without any recourse. By extinguishing claims only for students involuntarily displaced into online learning, the statute singles out a narrow class of plaintiffs for unfavorable treatment, undermining both the Contracts Clause and the broader principle of equal justice under the law.

One important factor that the court overlooked is the significant difference in the quality of education that students received once classes transitioned online. Though schools made admirable efforts to adapt, the educational experience provided was fundamentally different from the in-person, hands-on program for which students had initially signed up. A recent study found that the pandemic "negatively impacted students' academic outcomes, including academic performance and persistence in college, jeopardizing their future occupational prospects."[125] Engagement, a critical

121. 438 U.S. 234 (1978).

122. *Id.* at 244 n.15.

123. 350 F.2d 445 (1965).

124. *Id.* at 449–50.

125. Jazmin A Reyes-Portillo, Carrie Masia Warner, Emily A. Kline, Michael T. Bixter, Brian C. Chu, Regina Miranda, Erum Nadeem, Amanda Nickerson, Ana Ortin Peralta, Laura Reigada, Shireen L. Rizvi, Amy K. Roy, Jess Shatkin, Emily Kalver, Danielle Rette, Ellen-ge Denton & Elizabeth L. Jeglic, *The Psychological, Academic, and Economic Impact of COVID-19 on College Students in the Epicenter of the Pandemic*, at 474, *in* 10 EMERGING ADULTHOOD, art. 2 (2022), https://pmc.ncbi.nlm.nih.gov/articles/PMC8832132/ [https://perma.cc/E2PL-XXSS].

factor in academic success, also declined.[126] Another study found that, though the pandemic had a lesser effect on college students than K-12 students, "professors report higher rates of missed assignments" and have noted that "students are more hesitant to engage in classroom discussions, and are more likely to be on their phones during class."[127]

The distinction between in-person and online education is not merely theoretical. The fact that students received something radically different from what they bargained raises the question: are students paying thousands of dollars to universities for the piece of paper—the degree—or for the quality of education that they receive? If it is the latter, we must acknowledge that even the most elite universities were unable to provide the level of education that students had paid for once they transitioned to online learning. This is a difficult reality, but nonetheless, the spring semester was materially different from what students bargained for. Simply allowing students to continue their coursework online was not enough to fulfill the original contract.

## IV. WHY ARE COURTS COMING OUT THIS WAY?

Thus far, no court in the United States has ruled in favor of student plaintiffs seeking COVID-19-related refunds. One possible explanation for courts' reluctance to allow these claims to proceed is a concern about setting a precedent that could trigger a wave of similar lawsuits. A single ruling in favor of students may open the floodgates to litigation nationwide, potentially straining judicial resources and imposing serious financial burdens on colleges and universities. Faced with that risk, courts may be inclined to err on the side of protecting institutions.

The Supreme Court of North Carolina's decision in *North State Deli, LLC v. Cincinnati Insurance Co.*,[128] however, illustrates that floodgate concerns do not always dictate outcomes. There, the court held that restaurants forced to suspend operations due to COVID-19 orders were entitled to coverage under their business interruption insurance policies, rejecting insurers' arguments that the losses did not constitute "direct physical loss."[129] The court emphasized that a reasonable policyholder could understand the policy language to include forced closures, particularly given the lack of any virus exclusion and the insurers' superior drafting power.[130]

126. *Pandemic Learning Loss and Covid-19: Education Impacts*, ANNIE E. CASEY FOUND. (July 8, 2024), https://www.aecf.org/blog/pandemic-learning-loss-impacting-young-peoples-futures [https://perma.cc/9S96-ZBDK].

127. *Id.*

128. 386 N.C. 733, 908 S.E.2d 802 (2024).

129. *Id.* at 735, 908 S.E.2d at 805.

130. *Id.* at 740–42, 908 S.E.2d at 808–09.

Importantly, this decision makes the Supreme Court of North Carolina just the second high court to rule in favor of policyholders in such claims, diverging from the overwhelming national trend.[131] Courts across the country have largely sided with insurance carriers in disputes arising from COVID-19 shutdowns,[132] and the contrast is especially striking given that both the insurance and student refund cases involve courts interpreting contracts in the context of pandemic-related disruptions but produced opposite outcomes. Concerns about systemic consequences, more than pure legal reasoning, may be shaping the judiciary's approach to student refund litigation.

Further complicating this issue is the argument that schools couldn't afford to give refunds even if they wanted to. In the aforementioned Southern Methodist University case, one organization voiced that, if Texas schools had to refund students, it would have "bankrupted" them.[133] Those in support of UNC in *Dieckhaus* shared similar concerns, noting that "the net amount of tuition and fees for the semester was approximately $653 million," and "[i]f one assumes Plaintiffs completed 40% of the semester remotely, the prorated amount for damages purposes would be approximately $261 million."[134]

By itself, $261 million seems like a substantial figure. But in context, the plaintiffs were suing the entire UNC school system, which reported a total revenue of approximately $15 billion in 2024.[135] Of course, much of that revenue goes toward essential operating costs, such as salaries, facilities, research, and student services. Still, the scale of that income raises a legitimate question: what is the system's actual profit margin, and would refunding $261 million truly impose a meaningful financial burden? Considering these figures, it is at least worth asking whether the cost of refunds would have been a mere drop in the bucket rather than a serious threat to the system's fiscal stability.

The inaction of North Carolina's courts is particularly telling in this case. The district court granted the motion to dismiss without articulating a rationale, and the Supreme Court of North Carolina offered no clear reasoning. It stated that, because of the tie, the decision was affirmed without precedential value.[136] The silence is significant, not just for what it fails to say, but for what it refuses to confront. Rather than engage with the merits or grapple with the broader

131. *See* William Rabb, *NC Supreme Court Bucks Trend, Finds COVID Caused Direct Physical Loss to Restaurants*, INS. J. (Dec. 16, 2024), https://www.insurancejournal.com/news/southeast/2024/12/16/804858.htm [https://perma.cc/Y99N-CA4Z].

132. *Id.*

133. *See* Osibamowo, *supra* note 96.

134. Defendant-Appellee's New Brief at 48 n.13, Dieckhaus v. Bd. Of Governors of the Univ. N.C., 386 N.C. 677, 908 S.E.2d 813 (2024) (No. 105PA23).

135. UNIV. N.C. SYS., CONSOLIDATED FINANCIAL REPORT 6 (2024), https://www.northcarolina.edu/wp-content/uploads/reports-and-documents/finance-documents/fy-2023-unc-system-consolidated-report.pdf [https://perma.cc/6TQ2-MZGF].

136. *Dieckhaus*, 386 N.C. at 677, 908 S.E.2d at 814.

policy issues at stake, the judiciary missed an opportunity to set an example of accountability and fairness in an unprecedented situation.

The Supreme Court of North Carolina has, in the past, confronted these kinds of institutional questions head-on. In *Smith*, the court explicitly warned that broad sovereign immunity could deter individuals from entering into contracts with the State.[137] That court understood that immunity, if not cabined, would create a fundamentally uneven playing field, and people would be disinclined from engaging. That is precisely the dynamic at play here. Students paid for a specific bundle of services, many of which were never provided, and the State, rather than addressing that imbalance, asserted immunity, and avoided accountability. The court's refusal to engage with these concerns sets a troubling precedent: at a moment when clarity and fairness were most needed, the judiciary declined to provide either.

## CONCLUSION

The North Carolina courts' decisions to uphold statutory immunity in this case missed a crucial opportunity to address the larger issues of fairness and accountability that the pandemic caused. Perhaps it would have been more appropriate for the court to acknowledge the complexity and unprecedented nature of the pandemic yet still recognize that students had legitimate claims for refunds based on the material changes to their educational experience. In the alternative, if the court found that allowing such claims would disrupt the stability of higher education institutions, it should have explicitly framed the issue as a matter of policy, dismissed the claim based on lack of standing, or found a way to limit the scope of these claims. By doing so, it could have provided a more balanced approach that acknowledged both the students' right to a refund and the financial realities of the institutions involved.

While the pandemic presented extraordinary challenges, it does not follow that those challenges should excuse institutions from honoring their contractual obligations. Sending students home during the pandemic was the right call—it was absolutely the right thing to do to protect public health. But doing the right thing in a crisis does not erase the obligation to also do the fair thing afterward. Universities should have refunded students for the services they never received, and the court set a dangerous precedent that contracts can be rewritten after the fact, with the backing of the legislature and the courts.

Lastly, the reluctance of the courts to allow these claims to proceed highlights a broader issue: consistency. Educational institutions should not be given special protection, while others must face the consequences of their actions. This inconsistency erodes trust in the legal system and raises questions

137. Smith v. State, 289 N.C. 303, 320, 222 S.E.2d. 412, 423–24 (1976).

about why higher education institutions, with their vast endowments and resources, are given a pass when it comes to fulfilling their obligations.

A generation of students experienced a diminished educational experience and were never compensated for their loss. Those same students have now entered the workforce with debt, disrupted learning, and a justice system that looked the other way for convenience. Ultimately, the resolution of this case sends a troubling message to the state: that they can break contracts when it is in their interest, pass a law to shield themselves from claims, and the courts will not intervene.

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