In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1741

OMAR HERNANDEZ, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

ILLINOIS INSTITUTE OF TECHNOLOGY,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 20-cv-3010 — **Franklin U. Valderrama**, *Judge*.

ARGUED SEPTEMBER 30, 2022 — DECIDED MARCH 27, 2023

Before WOOD, ST. EVE, and KIRSCH, *Circuit Judges*.

WOOD, *Circuit Judge*. Omar Hernandez seeks a partial refund of the tuition and fees he (along with the members of the classes he would like to represent) paid to the Illinois Institute of Technology for the Spring 2020 semester. In March 2020, IIT halted in-person classes, switched to all-online instruction, and restricted access to its campus and facilities for the remainder of the semester in response to the COVID-19

pandemic. Finding no meaningful distinctions between his case and *Gociman v. Loyola University of Chicago*, 41 F.4th 873 (7th Cir. 2022), we hold that Hernandez has alleged enough to go forward. We reverse the district court's dismissal of the case and remand for further proceedings.

I

Illinois Institute of Technology is a nonprofit higher education institution with campuses in Chicago and Wheaton, Illinois. At the outset of the COVID-19 pandemic in March 2020, like practically every other college and university, IIT suspended all in-person instruction, moved all classes online, and restricted access to campus facilities. IIT did not refund tuition or mandatory fees to its students.

Hernandez, a student who paid tuition and fees for the Spring 2020 semester, filed this lawsuit against IIT. He relied on the court's jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d), because minimal diversity existed, there were more than 100 class members, and the amount in controversy exceeds $5,000,000. (Both Hernandez and IIT are citizens of Illinois, but the statute confirms that this does not defeat jurisdiction, which is ascertained as of the date of filing. See 28 U.S.C. § 1332(d)(7).) He invokes two theories in his quest for damages from IIT. First, he alleges that an express or implied contract was formed, under which the university promised to provide in-person instruction, services, and resources, in exchange for the student's payment of tuition and compulsory fees. He singles out certain of these fees, including Activity Fees, Student Services Fees, Professional Co-Curricular Fees, and Studio Fees. The university, he contends, breached this contract. His complaint also raises an

unjust enrichment theory, based on the university's retention of students' full tuition and fees.

Hernandez's complaint relies on pre-pandemic IIT materials that are replete with references to in-person, on-campus instruction, as well as to IIT's past practice of providing in-person, on-campus education. For example, IIT encouraged prospective students to "picture [themselves] on campus" where they would "live, eat, learn, and play," and it advertised "hands-on programs" with "face-to-face interaction with professors, mentors, and peers." The online course registration portal specified whether a course would be taught online or by the "traditional instruction method," *i.e.*, in person. Notably, IIT offered separate graduate-level "distance education degree and certificate programs," but it did not offer a fully online option for all graduate degree programs, nor did it do so for undergraduate students. Indeed, undergraduate students were not permitted to register for an online class without special approval. IIT also required undergraduate students to live on campus for two years unless they sought and received an exemption.

IIT argues that these materials and past practices do not amount to an identifiable and enforceable promise, either express or implied, to provide in-person, on-campus instruction. It further contends that Hernandez's claims are foreclosed by its tuition-refund policy. Finally, IIT contends that Hernandez is really asserting a claim of educational malpractice, but Illinois has not recognized any such cause of action.

The district court granted IIT's motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss all counts for failure to state a claim. In so doing, however, it rejected IIT's educational malpractice argument. It found instead that

Hernandez failed to identify any promise to provide in-person, on-campus instruction that was specific enough to support an express or implied breach-of-contract claim. The court also held that Hernandez failed to state a claim for unjust enrichment, because his Second Amended Complaint incorporated his allegations of an enforceable contract in the unjust enrichment count, and the two cannot coexist. The court declined to reach the class certification issue.

While this appeal was pending, we decided *Gociman v. Loyola University of Chicago*, 41 F.4th 873 (7th Cir. 2022), which involved similar claims brought by Loyola students affected by the pandemic. There we held that the plaintiff students adequately stated claims for breach of an implied contract under Illinois law, and that their claims were not educational malpractice complaints in disguise. We rejected the argument that there was an express contract between Loyola and the students.

II

We approach a dismissal for failure to state a claim *de novo*, accepting all well-pleaded facts as true and drawing all reasonable inferences in favor of the plaintiff. *Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co.*, 20 F.4th 303, 308 (7th Cir. 2021).

Illinois law governs the scope of IIT's obligations to its students. We must do our best to apply that law to the unprecedented disruption of traditional university operations caused by the COVID-19 pandemic. In these circumstances, we "use our own best judgment to estimate how the [Illinois] Supreme Court would rule as to its law," affording due consideration

to intermediate state court decisions. *Zahn v. N. Am. Power & Gas, LLC*, 815 F.3d 1082, 1087–88 (7th Cir. 2016).

Some basic principles are well established. First, Illinois courts have recognized that the student-university relationship is contractual in nature, though it is not a perfect analogue to "traditional, commercial contracts." *Bosch v. NorthShore Univ. Health Sys.*, 2019 IL App (1st) 190070, ¶¶ 29–30. Second, like any party to a contract, a student may sue if a university breaches a contractual promise. See, *e.g.*, *Steinberg v. Chi. Med. Sch.*, 69 Ill. 2d 320, 332 (Ill. 1977) ("A contract between a private institution and a student confers duties upon both parties which cannot be arbitrarily disregarded and may be judicially enforced." (quoting *DeMarco v. Univ. of Health Scis./Chi. Med. Sch.*, 40 Ill. App. 3d 474, 480 (Ill. App. Ct. 1976))). And third, distinctively, universities are generally shielded from suits that require courts to evaluate the quality of a student's education or to second-guess a university's academic decisions, even if such suits are styled as breach-of-contract actions. See *Bosch*, 2019 IL App (1st) 190070, ¶ 37 (discussing Illinois courts' deference to universities "with respect to the establishment, maintenance, and enforcement of academic standards"). With these principles in mind, we evaluate whether Hernandez has stated a claim for breach of contract or unjust enrichment.

A. Breach of Contract

To state a claim for breach of contract in Illinois, a plaintiff must plead: "(1) the existence of a valid and enforceable contract; (2) substantial performance by the plaintiff; (3) a breach by the defendant; and (4) damages." *Gociman*, 41 F.4th at 883 (citing *Babbitt Muns., Inc. v. Health Care Serv. Corp.*, 2016 IL App (1st) 152662, ¶ 27). Under Illinois law, "the only

difference between an express contract and an implied contract is that an implied contract is inferred from the facts and conduct of the parties, rather than from an oral or written agreement." *BMO Harris Bank, N.A. v. Porter*, 2018 IL App (1st) 171308, ¶ 52. We note that in this context, the state courts are speaking of a contract that is implied in fact, not a contract implied in law. The latter theory arises when there is *no* contract, either express or implied in fact, but where an equitable doctrine such as unjust enrichment might be available. See *Marcatante v. City of Chicago*, 657 F.3d 433, 442 (7th Cir. 2011) ("Unlike contracts implied in fact, contracts implied in law arise notwithstanding the parties' intentions and are no contracts at all. They are instead governed by equitable principles." (internal citations omitted)).

Even absent a formal document signed by both the university and the student, with the word "Contract" at the top of the page, "a student may establish that an implied contract existed between himself and the university that entitled the student to a specific right, such as the right to a continuing education or the right not to be suspended without good cause." *Bissessur v. Indiana Univ. Bd. of Trustees*, 581 F.3d 599, 601 (7th Cir. 2009). The school's customs, conduct, and materials such as "catalogs, bulletins, circulars, regulations, and other publications" may support an implied contract and its terms—provided that they evidence an intent to be bound. *Gociman*, 41 F.4th at 883.

This means that in order to survive dismissal, Hernandez had to allege plausibly that IIT promised to provide in-person instruction and access to campus facilities in exchange for his tuition and fees. He may do so either by pointing to a written or oral agreement that states as much (an express contract), or

by showing that an identifiable contractual promise can be inferred from "the facts and conduct" of IIT (an implied contract). *BMO Harris Bank*, 2018 IL App (1st) 171308, ¶ 52.

To support his contract claims, Hernandez primarily relies on IIT's numerous references to in-person, on-campus instruction in its "website, academic catalogs, student handbooks, correspondence, marketing materials and other circulars, bulletins, and publications." For example, IIT's marketing materials touted the many facilities and resources on its two campuses and encouraged prospective students to visit campus "to see where you'll learn, live, eat, and have fun." More importantly, its Academic Catalog and class registration portal differentiate between "Traditional" and "Online" instruction, and "specifically prohibit traditional students from registering for online classes, absent approval." The university also differentiates between its traditional programs and its fully online programs, which were available for some—but not all—of its degree programs. Finally, some mandatory fees apply only to on-campus activities. For example, there is an Activity Fee for "programs directly related to campus activities …. [and] campus events." And the required Student Services Fees are earmarked to support "*on-campus* departments such as Athletics, Paul V. Galvin Library, Career Services, and Technology Services," though some of those departments might also be adapted to an online presence.

These materials are similar to those on which the Loyola University students in *Gociman* relied. But we did not accept the Loyola students' arguments in their entirety. We concluded that their complaint could not support an express contract theory, despite the references to in-person instruction in "Loyola's catalogs, registration portal, pre-pandemic practice,

and different charges for Loyola's online versus on-campus programs." See *Gociman*, 41 F.4th at 884. Nevertheless, we found that "taken as a whole, these sources are sufficient to show an implied contract to provide in-person instruction and access to Loyola's campus in exchange for tuition and certain mandatory fees." *Id.*

Hernandez's complaint is no more specific than the one in *Gociman* for purposes of alleging an express contract. We therefore conclude that it too does not suffice to allow him to proceed on the theory that IIT entered into an express contract to provide in-person instruction and access to physical facilities in exchange for tuition and fees. As in *Gociman*, however, the picture is different for a contract implied in fact. First, Hernandez did not need to spell out his legal theory in the complaint; the Federal Rules of Civil Procedure do not require a plaintiff to plead legal theories. See, *e.g.*, *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (*per curiam*); *Bartholet v. Reishauer A.G. (Zürich)*, 953 F.2d 1073, 1078 (7th Cir. 1992). Here, Hernandez has sufficiently alleged facts that plausibly suggest the existence of an implied contract for in-person education and access to physical facilities and resources. He alleged that IIT has a long-established practice of providing in-person instruction and on-campus resources, and that IIT has consistently indicated that the service it is selling is one that involves an in-person, on-campus experience. These representations appear in its website, course catalogue, and other official materials provided to current and prospective students. We conclude, just as we did in *Gociman*, that this suffices for the present to support Hernandez's claim that an identifiable contractual promise to provide an in-person, on-campus university experience in exchange for tuition and fees can be inferred

from "the facts and conduct" of IIT. *BMO Harris Bank*, 2018 IL App (1st) 171308, ¶ 52.

IIT argues that this case is distinguishable from *Gociman* because, in contrast to the Loyola plaintiffs there, Hernandez has not alleged that the IIT "students enrolled in the traditional on-campus program paid higher tuition and fees than students enrolled in [IIT's] online program." *Gociman*, 41 F.4th at 885. But the public-facing price differential for in-person versus online courses was only one of several factors that we held supported the students' claim that Loyola had made an implied promise to provide in-person, on-campus instruction. And we note that, while Hernandez does not allege a price difference in the methods of instruction, he does claim that IIT treated its online courses as "separate and distinct products." That is easy to see in other contexts. For example, a person who contracted to buy an all-electric car would not accept delivery of a conventional internal-combustion model even if the price, size, and other amenities were identical. And in any event, we did not assign dispositive weight to Loyola's pricing system in *Gociman*, and we decline to do so here.

We recognize that there are many cases similar to this one and *Gociman*. Some will survive a motion to dismiss, and others will not. Breach-of-contract claims demand fact-specific inquiries. Our analysis should not be read to imply that in-person instruction and physical campus access are implied terms of every student-university contract. Even before the pandemic, schools had different practices for online programs. Afterwards, some may have rebated certain fees that were limited to on-campus activities; and virtually all have revamped their policies and programs going forward.

Having found that Hernandez has sufficiently alleged breach of an implied contract, we turn to IIT's other arguments in support of dismissal: that the claims are foreclosed by its refund policy and by Illinois's bar on educational malpractice claims.

B. Tuition-Refund Policy and Bulletin Disclaimer

IIT argues that its tuition-refund policy bars Hernandez's claims because, with a few narrow exceptions, the policy states that IIT retains "sole discretion" regarding whether to issue refunds. IIT also cites to the foreword to its 2019–2020 course catalog, which states that "information in this bulletin is subject to change without notice," to argue that it retains unfettered discretion to eliminate in-person instruction.

Whether the tuition-refund policy and course-catalog disclaimer, "which do[ ] not expressly refer to emergencies or other force majeure events, reasonably appl[y] to the pandemic," and whether IIT exercised the discretion it purports to have in accordance with the parties' reasonable expectations are questions better suited for a later time when there has been further factual development. *Gociman*, 41 F.4th at 884. "At this stage of the case however, the possibility of a generic disclaimer does not overcome a reasonable inference" that IIT agreed to provide in-person instruction and access to campus facilities in exchange for tuition and fees. *Id.*

C. Educational Malpractice

IIT also argues that Hernandez's claims fit better under the rubric of educational malpractice. "Educational malpractice" is an imprecise term that has been applied to a variety of different complaints against educational institutions. Typically, "a plaintiff asks a court to evaluate the course of instruction

or the soundness of a method of teaching that has been adopted by an educational institution." *Gociman*, 42 F.4th at 882. Illinois, like nearly every other state, has never recognized any such claim. See *Waugh v. Morgan Stanley & Co.*, 2012 IL App (1st) 102653, ¶ 42 (collecting cases from various jurisdictions and concluding that "claims sounding in educational malpractice … are not cognizable in Illinois"); *Ross v. Creighton Univ.*, 957 F.2d 410, 415 (7th Cir. 1992) (discussing the educational malpractice doctrine and concluding that "the Illinois Supreme Court would refuse to recognize the tort of educational malpractice").

Relatedly, Illinois courts have held that universities must be afforded significant deference when students sue because of "adverse academic decision[s]" such as rejections, expulsions, and dismissals. *Raethz v. Aurora Univ.*, 346 Ill. App. 3d 728, 732 (Ill. App. Ct. 2004). These suits often allege that a university has breached its contract with the student by expelling or declining to admit the student. Unlike classic educational malpractice claims, Illinois courts have not completely barred students from bringing these suits. But because of the policy concerns involved in second-guessing a university's academic judgment, a student bringing such a claim must show that the adverse academic decision "was made arbitrarily, capriciously, or in bad faith." *Id.* (emphasis omitted) (citing *Frederick v. Northwestern Univ. Dental Sch.*, 247 Ill. App. 3d 464, 471 (Ill. App. Ct. 1993)); accord *Bosch*, 2019 IL App (1st) 190070, ¶ 34; *Seitz-Partridge v. Loyola Univ. of Chi.*, 409 Ill. App. 3d 76, 82 (Ill. App. Ct. 2011); *Brody v. Finch Univ. of Health Scis./Chi. Med. Sch.*, 298 Ill. App. 3d 146, 156 (Ill. App. Ct. 1998).

Hernandez's claims do not fall within either category. He asks us neither to rule that the online education he received

was inadequate to prepare him to work in his chosen field of I.T. Management nor to review IIT's academic decisions about his performance. In fact, just as in *Gociman*, Hernandez's claims do not require us to evaluate the university's academic or educational judgment at all. 41 F.4th at 882–83. Rather, Hernandez asserts that he received "a materially different product" than what he bargained for. Just as a student may reasonably choose to attend College X over College Y without calling into question the quality of College Y's academic offerings, so too might a student choose in-person over online education.

The Fifth Circuit recently took a similar approach in another pandemic case: "Deciding whether [a university] breached its agreement to provide in-person instruction and on-campus access to facilities in exchange for pre-paid tuition and fees does not implicate educational questions best left to professional academic judgment." *Jones v. Administrators of Tulane Educ. Fund*, 51 F.4th 101, 110 (5th Cir. 2022). In sum, the deference accorded to a university's academic decisions plays no necessary part in a claim such as Hernandez's, and so the educational malpractice doctrine does not figure in our analysis. See *Gociman*, 41 F.4th at 882.

Nothing we say here should be taken as a comment on the merits of Hernandez's case. He may be unable to prove damages in a manner that does not collapse into education malpractice. But it would be inappropriate to speculate on later developments. We agree with our colleagues on the Fifth and D.C. Circuits that "[w]ith discovery, the students may be able to support a calculation of damages based not on any subjective evaluation of the quality of the online instruction received but on metrics such as [the university's] preestablished

disparate pricing of in-person and online instruction or on market value." *Jones*, 51 F.4th at 110; accord *Shaffer v. George Washington Univ.*, 27 F.4th 754, 765 (D.C. Cir. 2022) (rejecting, at the motion to dismiss stage, a university's argument that student plaintiffs failed to allege cognizable damages because damages would necessarily require the court to evaluate the quality or value of the education students received).

D. Unjust Enrichment

Finally, Hernandez pleads in the alternative that IIT was unjustly enriched at the students' expense when it retained the entirety of their tuition and fee payments while it simultaneously (1) saved significant sums of money in operating and staffing costs, and (2) received emergency federal aid.

To state a claim for unjust enrichment under Illinois law, "a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145, 160 (Ill. 1989). But a plaintiff may not recover under an unjust enrichment theory if there is an enforceable contract that governs the relevant subject matter. *Gociman*, 41 F.4th at 886 (citing *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 604 (Ill. App. Ct. 2005)). Normally this rule makes sense. If a defendant has fulfilled her obligations under a valid contract with the plaintiff, then she cannot be said to have acted "unjustly" to the plaintiff's detriment. And if the defendant has *not* fulfilled her obligations under a valid contract with the plaintiff, then the plaintiff has a remedy at law for breach. Either way, the equitable remedy of unjust enrichment is inapplicable.

Nonetheless, not every case involving a contract claim is clear cut, especially at the pleading stage. To create breathing room in such circumstances, we have recognized that plaintiffs may plead contract claims and unjust enrichment in the alternative. See, *e.g.*, *Mashallah, Inc. v. W. Bend Mut. Ins. Co.*, 20 F.4th 311, 325 (7th Cir. 2021); *Cohen v. Am. Sec. Ins. Co.*, 735 F.3d 601, 615 (7th Cir. 2013). This allows plaintiffs to proceed in situations where "the validity or the scope of the contract is difficult to determine, or if the claim at issue falls outside the contract." *Gociman*, 41 F.4th at 887. This does not condone half-baked or legally insufficient allegations of unjust enrichment. To survive a motion to dismiss, the plaintiff must still "give enough details about the subject-matter of the case to present a story that holds together." *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010). Furthermore, plaintiffs may not "incorporate by reference allegations of the existence of a [valid] contract between the parties in the unjust enrichment count," because this would seek relief that Illinois does not offer. *Gociman*, 41 F.4th at 887.

This was the misstep taken by the *Gociman* students, who inadvertently "incorporated by reference allegations of the existence of a contract between the parties." *Id.* We held that, but for this pleading error, the students had adequately stated a claim for unjust enrichment. *Id.* Because plaintiffs are generally "entitled to at least one chance to amend their complaint to cure an error in response to a district court's dismissal order unless amendment would be futile or otherwise unwarranted," we gave the students an opportunity to amend their complaint. *Id*.

IIT argues that Hernandez has fallen into the same trap as the *Gociman* students, because the unjust enrichment counts

in his complaint incorporate by reference "all preceding allegations as though fully set forth herein." That would include the contract allegations in the breach-of-contract counts. The district court agreed. Because it already had afforded Hernandez one opportunity to amend, it granted IIT's motion to dismiss the unjust enrichment allegations.

There is a critical difference, however, between the *Gociman* complaint and Hernandez's complaint: Hernandez expressly states that the unjust enrichment claim "is pled in the alternative to, *and to the extent it is determined a contract does not exist or otherwise apply*, the contract-based claim set forth in the First Cause of Action above." Likewise, his unjust enrichment claim on behalf of the putative Fees Class states that "[t]his claim is pled in the alternative to, *and to the extent it is determined a contract does not exist or otherwise apply*, the contract-based claim set forth in the Fourth Cause of Action."

Hernandez's round-about way of resolving the pleading issue certainly is not a model to be emulated. Nevertheless, we find that this language is sufficient under Rule 8—even if barely so—to assure that Hernandez is not entering the forbidden territory of asserting the existence of an enforceable contract as a component of his unjust enrichment claim. See *Johnson*, 574 U.S. at 11 (federal pleading rules are designed "to discourage battles over mere form of statement" and "to avoid civil cases turning on technicalities").

Hernandez alleges that IIT "unjustly retained" the benefit of students' full tuition and fees while it simultaneously "received significant aid from the federal government" and "saved significant sums of money" by "operat[ing] a remote, on-line campus [rather] than a fully open physical campus." This is sufficient to state a claim for unjust enrichment. See

Gociman, 41 F.4th at 887 (holding that students adequately pleaded an unjust enrichment claim where they "allege[d] that they paid tuition for an in-person educational experience, which the university failed to provide though it retained the benefit of tuition").

III

We REVERSE the decision of the district court and REMAND for further proceedings consistent with this opinion.

ST. EVE, *Circuit Judge*, concurring. I recognize that *Gociman v. Loyola University of Chicago*, 41 F.4th 873 (7th Cir. 2022), is the law of the circuit and join the Court's opinion based on the reasoning of that case. I write separately to reiterate my belief that *Gociman* was wrongly decided. Although not explicitly delineated, Illinois state courts have historically recognized two distinct types of implied contracts between students and schools: "specific promise" implied contracts and "fundamental promise" implied contracts. *Id.* at 888–89 (St. Eve, J., concurring). The Court's opinion in *Gociman* conflates the two categories, recognizing "fundamental promise" contracts outside the matriculation and graduation contexts in which they were created. *Id.* at 891–92. As a federal court sitting in diversity, it is not our place to expand the limits of state law. *Id.*

KIRSCH, *Circuit Judge*, concurring. I recognize that *Gociman v. Loyola University of Chicago*, 41 F.4th 873 (7th Cir. 2022), is controlling and join today's opinion not because I think *Gociman* was correctly decided, but based on that binding precedent. The majority in *Gociman* did not certify this important question to the Illinois Supreme Court, and now it's too late to do so. *Nat'l Cycle, Inc. v. Savoy Reinsurance Co.*, 938 F.2d 61, 64 (7th Cir. 1991) ("[T]he right time to certify a question is before the first federal decision on the point. Certification eliminates the need to expend judicial resources predicting how another court will decide a question. Once we have invested the time and effort to make the prediction, the costs have been sunk."); see also *Barnes v. Anyanwu*, 391 F. App'x 549, 554 (7th Cir. 2010) (declining to certify a question because "in this circuit at least, it is resolved"). I urge the Illinois courts—the final arbiters of Illinois law—to take up and decide this issue as quickly as the opportunity affords.