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Colleges and Universities: Addressing and Mitigating COVID-19 Risks

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Agenda

- Tuition reimbursement class action litigation
- Antitrust pitfalls when discussing best practices with other colleges and universities
- Potential insurance coverages, including how to maximize coverage
- Facility considerations in reopening campuses

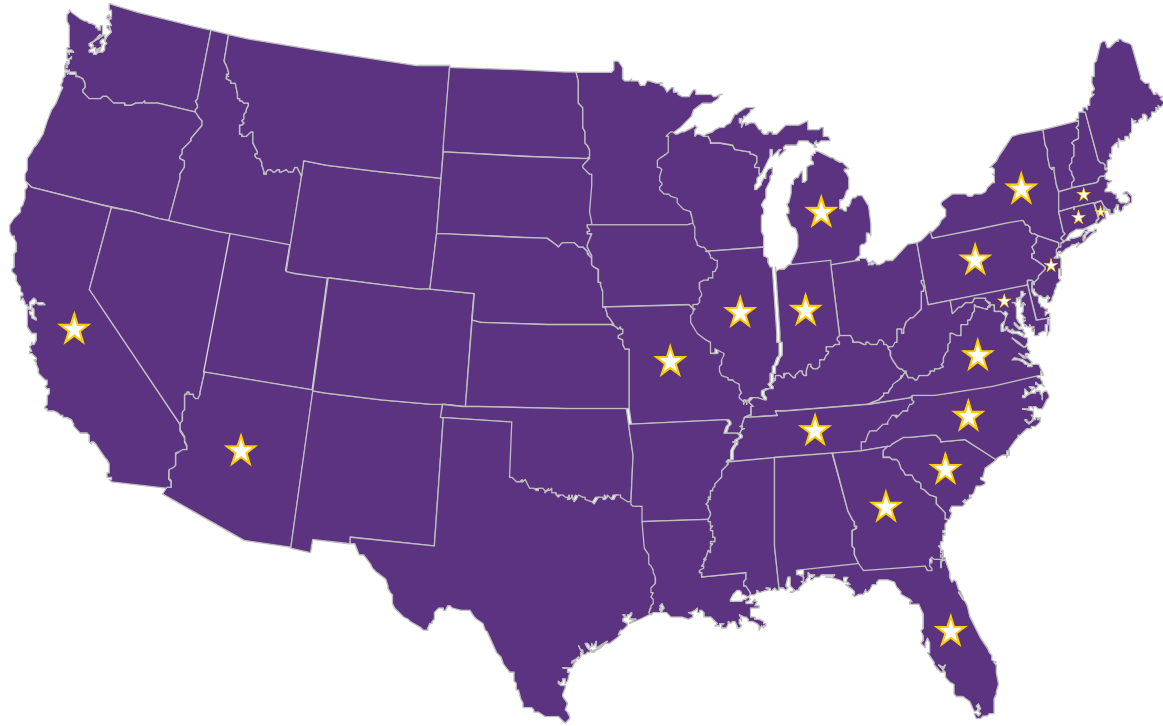
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COVID-19 Refund Class Actions

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Summary of College and University Refund Litigation

75+ class action lawsuits filed, mostly in federal court.



Summary of College and University Refund Litigation (*cont.*)



In-Person vs. Online

Variety of Lost Benefits in
Online Scenario

Alleged Claims

Breach of Contract
Unjust Enrichment
Conversion

Reimbursement

Tuition
Room and Board
Meals
Fees for Campus Services

Class Definition

Enrollment Period
Payment Responsibility
Access to Benefits

Summary of College and University Policies Regarding Refunds

- Partial refund of room and board and certain fees or credits for Fall 2020
- No refunds on tuition
- Discounts or incentives on summer or fall tuition or fees
- Hold tuition flat for Fall 2020

Summary of College and University Policies Regarding Refunds (*cont.*)

University A	University B	University C	University D	University E
<ul style="list-style-type: none">• Pro rata reimbursement for housing and/or dining fees• No refunds on tuition	<ul style="list-style-type: none">• 60% refund for Spring Quarter 2020 for those students who have withdrawn as of March 20, 2020	<ul style="list-style-type: none">• Room and board charges prorated• Extended deadline to file for leave of absence for Spring Quarter, which entitles students to a full refund of tuition	<ul style="list-style-type: none">• Room and board prorated by 40%• Other fees prorated• No refund on tuition, instructional costs, or for other services that remain available such as health-related fees	<ul style="list-style-type: none">• Room and board prorated based on date vacated• Offering \$500 emergency funding to assist with travel, storage, and moving logistics• No refund on tuition

Potential Defenses to Claims

Merits

- “Educational malpractice”
- Insufficient pleading
- Contract provision permitting retention of tuition and fees
- No conversion for generalized claim for money
- No demand for converted property
- Force majeure provisions
- Doctrine of sovereign immunity
- No claim where contract exists

Class Certification

- Atypical claims
- Individual issues
- Unascertainable

Strategies for Minimizing the Risk of Litigation



Handbooks, Policies, Contracts

- Tuition and fees
- Force majeure clause
- ADR provisions
- Class action waivers



Credits, Discounts

- Tuition
- Pro rata room/board
- Litigation costs/savings from campus closings

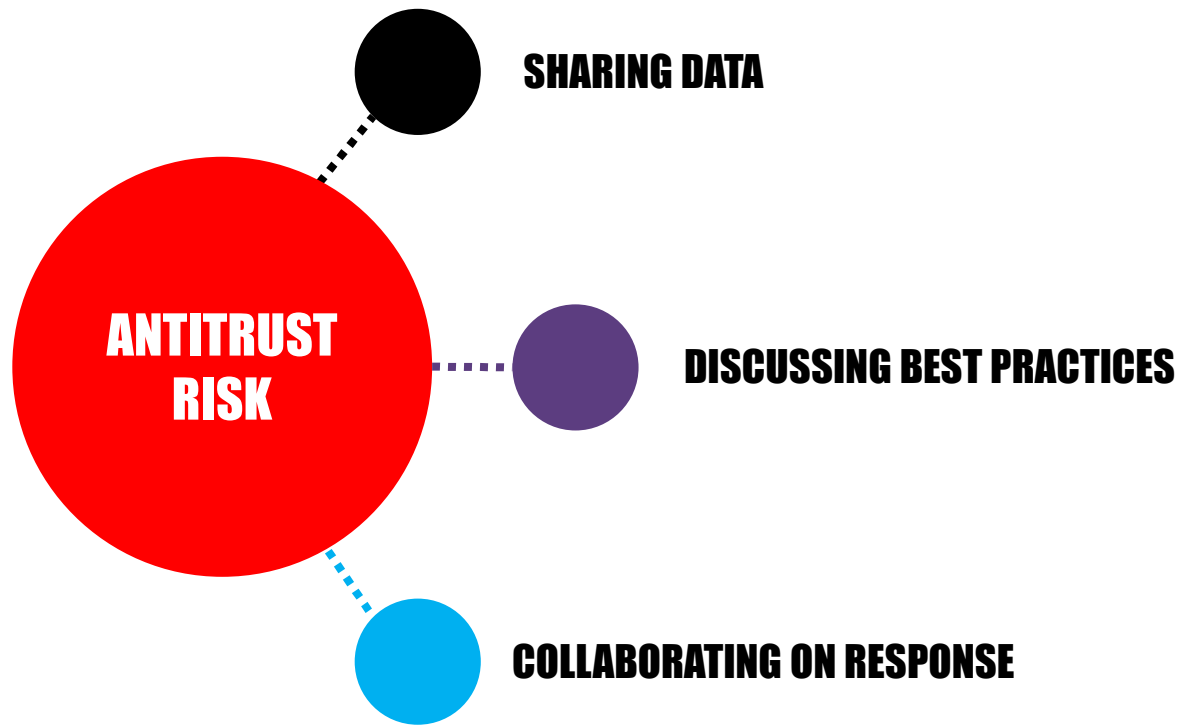
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Antitrust Risks

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Responding to COVID-19

Given the unprecedented nature of the pandemic, many colleges and universities are reaching out to counterparts at other institutions to discuss how to respond



Colleges and Universities Susceptible to Antitrust Risk

- Individuals in higher education often view counterparts as colleagues rather than competitors
- Often leads to collaboration and information sharing
 - Formal
 - Informal
- May lead to explicit or implicit agreement

Antitrust Spotlight on Colleges and Universities

The New York Times

Ivy Universities Deny Price-Fixing But Agree to Avoid It in the Future

Facing Justice Department charges that they violated Federal antitrust laws, the eight colleges and universities in the Ivy League have agreed to stop sharing information on student financial aid and to avoid collaborating on tuition increases.

May 23, 1991

The New York Times

Justice Department Launches Probe of College Early Admissions

WASHINGTON — The Justice Department is probing whether colleges and universities are violating antitrust laws by exchanging information about prospective students who make early decision commitments, the latest in a series of higher education-admissions policies that prosecutors are scrutinizing.

April 10, 2018

Forbes

The Department Of Justice Aims To Unravel The College Admission Market

Sep 5, 2019

INSIDE HIGHER ED

June 18, 2013

A Deficit of Trust

Justice Department investigation into whether merit aid discussions violate antitrust rules highlights the barriers that private colleges face in dialing back the practice and the unclear laws under which they operate.

INSIDE HIGHER ED

December 16, 2019

Justice Department Sues, Settles With NACAC

The Justice Department sued the National Association for College Admission Counseling on Thursday for allegedly violating antitrust rules, but it **simultaneously settled the suit** with a proposed consent decree based on changes NACAC has already made to its rules.

Antitrust Basics:

Coordinated Action

Per Se Illegal

Conduct so pernicious, the only question is whether it happened (e.g., price-fixing, horizontal market allocation, agreements to not compete for employees, bid-rigging)

Sherman Act § 1:

“Every contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . , is declared to be illegal.”

Rule of Reason Analysis

Considers justification for conduct, weighs an agreement’s pro- and anti-competitive effects

Evaluating Antitrust Risk

- Topics that relate to health and safety have lower risk
- Topics that relate to competitive aspects (e.g., tuition, costs, salaries, benefits) raise potential antitrust concerns
- Need to be careful that acceptable discussions do not “tip” into unacceptable ones

A central blue circle with a gradient is surrounded by a dashed grey circle. Six purple circles are placed around the dashed circle, each connected to a text block. The text blocks are: Antitrust Policy (top-left), Education and Training (top-right), Issue Spotting (right), Escalation Process (bottom-right), Risk Mitigation (bottom-left), and Risk Awareness (left).

Antitrust Checklist

Antitrust Policy

Do you have an antitrust policy and is it up to date?

Education and Training

Are administrators, faculty, and staff aware of the antitrust policy and appropriately trained?

Risk Awareness

Is there general awareness of situations that may have increased antitrust risk?

Issue Spotting

Are in-house counsel trained to issue-spot potential problem areas and intervene or counsel appropriately?

Risk Mitigation

Are individuals at the institution trained on how to mitigate antitrust risk to ensure bigger problems do not arise?

Escalation Process

Is there a process to escalate issues within the institution, and outside counsel if necessary, if a problem is identified?

Navigating Murky Antitrust Waters

- Antitrust guidance ≠ “No, you can’t do that.”
- Collaboration is often procompetitive → recognized by the antitrust laws
- Often there is a solution that minimizes antitrust risk

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Potential Insurance Coverages

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Potentially Applicable Insurance Coverages

Goals of Insurance Section:

- Provide an understanding of potentially available insurance for business losses and liabilities arising from COVID-19
- Outline steps to preserve claims, including notice to the insurer and documenting statements/proofs of loss
- Discuss the pros and cons of filing and pursuing a coverage claim

Potentially Applicable Insurance Coverages (*cont.*)

Important Considerations:

- Coverage will depend on policy language, the specific circumstances of the claim, and applicable state law
- Filing a notice of claim and proof of loss is necessary to protect rights
- Future events may impact claims for coverage--future regulatory actions and court decisions that are unknown today

Business Interruption/Time Element Coverage

- Protects the insured against losses of business income resulting from “physical loss or damage” to insured property by a covered peril
- Debate about what constitutes “physical loss or damage”

Civil or Military Authority Coverage

- Covers loss of business income during the time in which access to a covered location is prohibited by a civil or military order following damage to the property of others

Additional Coverages

- Event Cancellation
- Liability Coverage
 - General Liability
 - Directors & Officers (D&O) Insurance
 - Workers' Compensation

Preserving Claims; Recovering Insurance Proceeds

- Notice to Carrier
- Proofs/Statements of Loss
- Coverage Litigation

Conclusions and Recommendations

- Consult with Coverage Counsel
- Analyze the Pros and Cons of a Claim
- Make an Individual Decision
- Heed the Urgency

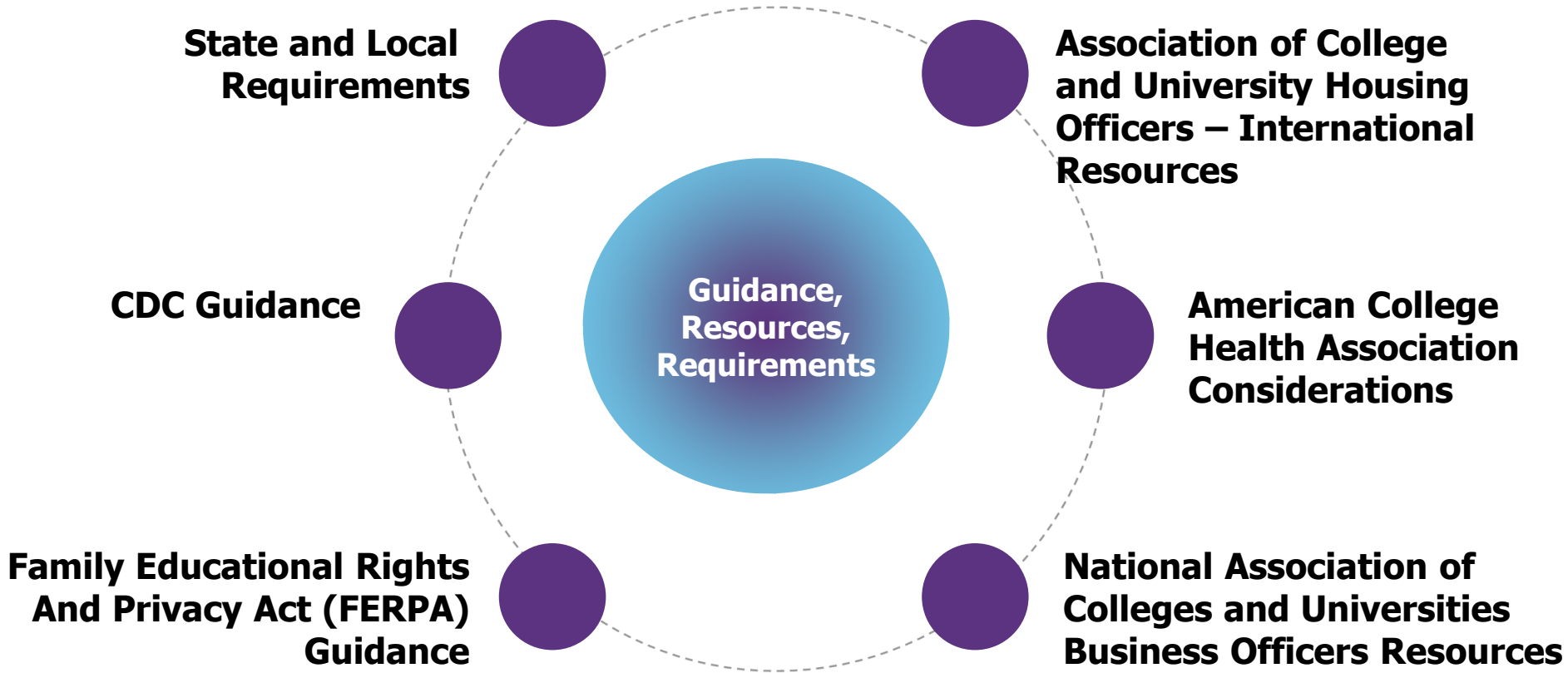
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Facility Considerations-- Reopening Campuses

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Key Questions to Facilitate Reopening

- What guidance, resources, and requirements should be considered prior to reopening?
- What is the physical layout of the campus and what adjustments can be made with respect to learning and communal facilities?
- What is the housing density and layout on your campus?
- How do colleges and universities plan and prepare?

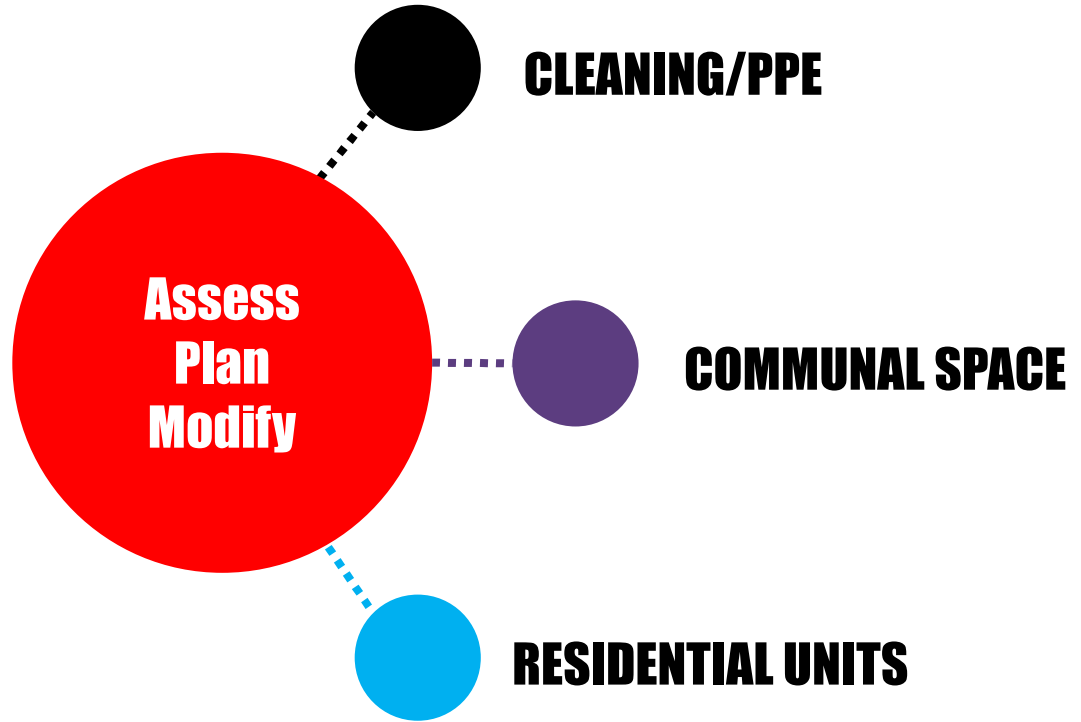


Campus and Facility Adjustments

- Engage in architectural planning
- Adapt the learning environment
- Increase cleaning and availability of PPE and sanitizing supplies
- Increase communication and training
- Move to single-use products and touchless technology

Housing Adaptations

Given the high-touch, interactive, communal nature of college life, many colleges and universities are faced with the challenge of adapting living space in the wake of the pandemic.



Planning and Preparation



Assess Resources

Assess resources on campus and in the broader community. Evaluate off-campus space and medical resources.



Prepare a Plan

Analyze guidance and prepare a plan and implementation strategy. Plan for prevention, containment, and management. Prepare policies and procedures and training materials.



Be Flexible

Continue to monitor guidance and update policies and procedures and plans as circumstances evolve.

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Q&A

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Biography



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With two decades of litigation experience, Molly Moriarty Lane defends clients in class action lawsuits and individual actions in the healthcare, retail, technology, and financial sectors. She counsels clients in actions alleging claims for breach of contract, antitrust violations, unfair competition, defamation, trade secret theft, business torts, and copyright violations. Molly has handled more than 30 class action lawsuits nationwide. Co-chair of the firm's class action litigation practice, she counsels clients in every stage of the litigation cycle.

Biography



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Sujal J. Shah represents clients on complex antitrust and unfair competition matters in the technology, transportation, financial, higher education, and sports sectors. He has defended clients in both individual and class actions on a wide range of antitrust claims, including price-fixing, bid-rigging, tying, exclusive dealing, and unlawful monopolization. He also aids clients in developing antitrust policies and training, and has extensive experience counseling clients on a variety of antitrust issues, such as competitor collaborations, participation in trade associations, no-hire and no-poach agreements, single-firm conduct, pricing policies, joint venture agreements, and vertical distribution arrangements.

Biography



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Brad Nes is a seasoned trial lawyer representing clients in complex commercial, insurance recovery, and business tort disputes. In the insurance area, he has represented policyholders in disputes involving general liability, property, fidelity and crime, professional liability, and mortgage insurance policies. He also has experience litigating complex business disputes involving a wide range of claims, including breach of contract, business torts, consumer fraud and unfair business practices, class actions, and civil RICO violations. He has successfully tried jury and bench trials in state and federal courts and has secured arbitration awards before domestic and international tribunals.

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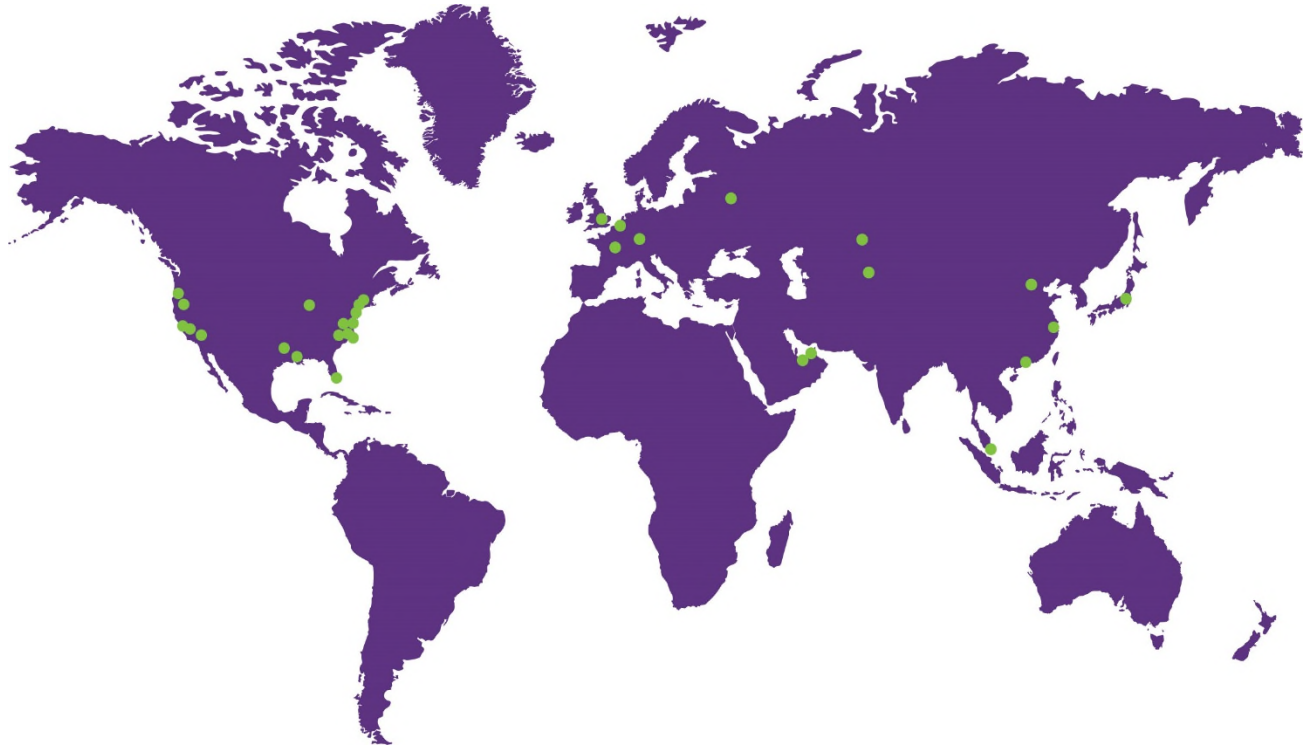
Kathy Keyser counsels clients through complex real estate transactions, including multijurisdictional portfolio transactions, complex energy transactions, and real estate joint ventures. She handles sophisticated corporate real estate transactions on a national scale, working with Real Estate Investment Trusts (REITs), public and private companies, energy companies, and banks. Kathy represents the nation's largest developer, owner, and manager of high-quality student housing in transactions throughout the United States.

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