

FRAUD ON THE RANKINGS

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The professional school Dean did not take the stand in his own defense,¹ but character witnesses² testified that he was a person of integrity. One witness said of the Dean, “I would trust him with my life, my children, my anything.”³ The Dean was “a ‘magnet, our inspiration,’” a “loyal friend” of “noble character,”⁴ and a beloved companion for “long walks on the water” involving “deep conversations . . . on books, movies and other topics.”⁵

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¹Kristy Bleizeffer, *B-School Dean Found Guilty of MBA Rankings Fraud*, YAHOO! FIN. (Nov. 29, 2021), <https://finance.yahoo.com/news/b-school-dean-found-guilty-222956827.html>; *see also* Lawrence Ukenye & Jack Danz, *Defense Rests in Former Fox Dean’s Trial*, THE TEMPLE NEWS (Nov. 26, 2021), <https://temple-news.com/defense-rests-in-former-fox-deans-trial/>.

²The defense sought to call a particularly interesting character witness to the stand—a sitting federal judge who was close friends with the accused. The court rejected that witness. *See United States v. Porat*, No. 21-170, 2021 WL 5631746, at *1 (E.D. Pa. Nov. 30, 2021).

³Ukenye & Danz, *supra* note 1.

⁴*Prosecution and Defense Rest on the Rankings Fraud Trial of the Deposed Dean of a High School*, 6PARK.NEWS/PENNSYLVANIA (Nov. 22, 2021, 3:59 PM), <https://6park.news/pennsylvania/prosecution-and-defense-rest-on-the-rankings-fraud-trial-of-the-deposed-dean-of-a-high-school.html>.

⁵*Id.*

The prosecution's witnesses painted a different view.⁶ The Dean “managed through fear and intimidation,” making staff members “tremble” and leaving them “downright scared.”⁷ The Dean directed staff members to take questionable positions in reporting data requested in external rankings by ordering staff members to submit inaccurate information about the program.⁸ In one case, when a staff member wrote to the Dean to express discomfort with a proposed rankings input submission, the Dean called the staff member in and told her not to send him emails “like this.”⁹ The Dean felt pressure to improve and maintain rankings, as the University’s internal investigation concluded, and this contributed to the reporting of inaccurate information.¹⁰ The professional school viewed rankings as a “key priority” and embraced a “concerted, rankings-focused strategy.”¹¹ Faculty had been alarmed even before the fraud was revealed that the school had “fostered the culture of pursuing higher rankings at all costs.”¹²

The jury found the less flattering view of the Dean more persuasive. He was found guilty of wire fraud and conspiracy to commit wire fraud for his role in “a scheme that falsely boosted the school’s position on the much-

⁶As in many cases of failed leadership, it is likely that the truth was somewhere in between. A good person may rise into a leadership position and then fall victim to the “Bathsheba Syndrome” as a byproduct of the success that brought them into a leadership position in the first place. Dean C. Ludwig & Clinton O. Longenecker, *The Bathsheba Syndrome: The Ethical Failure of Successful Leaders*, 12 J. BUS. ETHICS 265, 265 (1993).

⁷Kristy Bleizeffer, ‘An Intimidating Man’ Who Made Staffers ‘Tremble’: Temple Vice Dean Testifies in Rankings Fraud Trial, YAHOO! (Nov. 11, 2021), <https://www.yahoo.com/now/intimidating-man-made-staffers-tremble-162649016.html>.

⁸Antonio Planas & The Associated Press, *Former Temple University Business Dean Convicted of Fraud in Rankings Scheme*, NBC NEWS (Nov. 30, 2021, 12:18 PM), <https://www.nbcnews.com/news/us-news/former-temple-university-business-dean-convicted-fraud-rankings-scheme-rcna7089>.

⁹Bleizeffer, *supra* note 7.

¹⁰JONES DAY, FINDINGS AND RECOMMENDATIONS FROM JONES DAY INVESTIGATION INTO RANKINGS INFORMATION PROVIDED BY FOX SCHOOL TO U.S. NEWS 1 (2019), https://news.temple.edu/sites/news/files/images/findings_and_recommendations.pdf.

¹¹*Id.* at 3.

¹²Bleizeffer, *supra* note 1.

revered lists published in U.S. News and World Report.”¹³ The Dean faces up to twenty-five years in prison.¹⁴

While the case described in the preceding paragraphs arose in the context of a business school (Temple), the pressures on law school deans—feeding obsession with rankings—constitute one component of the classic “fraud triangle.”¹⁵ This concept explains fraud in organizational settings using a tripartite approach¹⁶—managers are under *pressure*¹⁷ to achieve results, have the *opportunity*¹⁸ to engage in fraud due to inadequate monitoring, and then engage in *rationalization*¹⁹ to justify choices they should know are wrong.

That fraud arises when executives are pressured to achieve performance goals is understandable does not make it any less tragic for affected organizations. When all is said and done, the costs of fraud will typically far outweigh the deceptively obtained advantage the responsible parties sought. Temple has paid out seventeen million dollars in settlements related to the rankings scandal,²⁰ including claims by graduates for fraud and breach of

¹³Shealyn Kilroy, *Ex-Temple Dean Guilty of Fraud: What Exactly did Moshe Porat Do, and What Price Will He Pay?*, BILLYPENN (Dec. 2, 2021, 10:00 AM), <https://billypenn.com/2021/12/02/temple-dean-guilty-rankings-scandal-moshe-porat-fox-business-school/>.

¹⁴Planas & The Associated Press, *supra* note 8.

¹⁵JOSEPH T. WELLS, OCCUPATIONAL FRAUD AND ABUSE 10 (1997) (citing DONALD R. CRESSEY, OTHER PEOPLE’S MONEY: A STUDY IN THE SOCIAL PSYCHOLOGY OF EMBEZZLEMENT (1953)).

¹⁶*See id.* at 11.

¹⁷Given the focus of alumni, faculty, and potential students, law school administrators may find themselves under pressure to increase and maintain rankings. *See infra* notes 170–181178 and accompanying text.

¹⁸Law school administrators have the opportunity to engage in deceptive reporting due to the decentralization of management in higher education and the lack of validation of submitted data by rankings organizations such as *U.S. News*. *See infra* notes 200193–202194.

¹⁹Law school administrators may rationalize deception to external rankings under the idea that “everyone is doing it”—that “gaming” the rankings is just “part of the game.” *See* Michele Anglade, *Value, Rankings, and Reform*, 33 REV. LITIG. 905, 915 (2014) (“‘Gaming’ the system has become an accepted norm.”). Others may rationalize deceptive reporting based on the belief that the rankings are themselves so deeply flawed that accurate reporting is not ethically required. *See infra* notes 174–183 and accompanying text. *See also* BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 72 (2012) (“They rationalized that since most law schools were doing it, it wasn’t wrong, and any school that did not boost numbers would suffer next to competitor schools that engaged in the practice.”).

²⁰Kilroy, *supra* note 13.

contract.²¹ These payouts are only a part of the expense associated with the fraudulent reporting scandal. The true costs include: (1) the costs of an internal investigation to determine what happened;²² (2) the additional cost of compliance regimes put in place to stop it from happening again;²³ (3) the severance payments and “golden parachute[s]” for administrators swept up in or brought down by the scandal;²⁴ and (4) lost donations following diminished alumni enthusiasm for a school now shown to have engaged in a cynical and short-sighted ploy (or at least to have made a bad hire or hires that pursued that path).²⁵

Law schools, to date, have avoided the obligation to make large-scale settlements for fraud-related lawsuits, though they certainly faced their share of lawsuits from aggrieved graduates.²⁶ Law school enrollment is well known to be counter-cyclical;²⁷ when the economy is bad, law enrollment booms and law schools enjoy a glut of resources, hire energetic new faculty, and ride high on a wave of enthusiasm—bright people want to learn from us! Inevitably, though, when business conditions improve and college graduates

²¹ Anne Bucher, *Temple University Class Action Says School Inflates Online MBA Rankings*, TOP CLASS ACTIONS (Feb. 14, 2018), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/temple-university-class-action-says-school-inflates-online-mba-rankings/> (“On Jan. 9, 2019, a \$5.5 million settlement was proposed to settle claims that Temple University overstated its business school rating to entice students.”); see also Complaint at 6, *Smith v. Temple Univ.*, No. 2:18-cv-00590 (E.D. Pa. Feb. 12, 2018). The case settled after the defense filed a motion to dismiss but before the court ruled on that motion. *Id.*

²² See Susan Snyder & Erin Arvedlund, *In Wake of Biz School Scandal, Temple Faces More Scrutiny for Data Falsification*, THE PHILA. INQUIRER (July 11, 2018), <https://www.inquirer.com/philly/education/temple-university-business-school-data-us-news-rankings-scrutiny-20180711.html>; see also *Agreement Reached in Fox School Class Action Case*, TEMPLE NOW (Dec. 21, 2018), <https://news.temple.edu/announcements/2018-12-20/agreement-reached-fox-school-class-action-case>.

²³ In the aftermath of the scandal, Temple indicated it would hire an external auditor for at least three years to review all business school “rankings submissions and spot-check those of other Temple schools and colleges.” The University planned to adopt new processes and “hire new employees” to help ensure the validity of future data submissions. Snyder & Arvedlund, *supra* note 22; see also TEMPLE NOW, *supra* note 22 (describing compliance measures put in place following rankings scandal and settlement of class action lawsuit).

²⁴ TAMANAHA, *supra* note 19, at 6.

²⁵ See Snyder & Arvedlund, *supra* note 22; see also TEMPLE NOW, *supra* note 22.

²⁶ See *infra* Part I.

²⁷ See Victor Gold, *Reducing the Cost of Legal Education: The Profession Hangs Together or Hangs Separately*, 66 SYRACUSE L. REV. 497, 502 (2016); see also Rebecca R. Ruiz, *Recession Spurs Interest in Law, Grad Programs*, SUN SENTINEL (Jan. 9, 2010, 12:00 AM), <https://www.sun-sentinel.com/news/fl-xpm-2010-01-10-1001090034-story.html>.

find other things to do with their time, law schools suffer from declines in enrollment and must reap the fruits of excess they sowed so recently. With the end of counter-cyclical boom years, on come the years of cynicism and self-loathing.

The downturn following the “Great Recession” of 2008–2009 led many law schools to experience their best years ever, from an enrollment standpoint.²⁸ But good times would not last.²⁹

The correction that followed in law school enrollment nationally—perhaps, one might say, the overcorrection—produced the predictable “legal education is broken” refrain.³⁰ But with the advent of social media, non-traditional publishing, and the possibility of both anonymity³¹ and self-aggrandizing fame the internet provides, the downturn in spirits across legal education was particularly severe and widespread in the middle part of the last decade.³² Internal critics, such as students, faculty, and administrators, joined external critics, such as the bench and bar.

The combination of pressure faced by deans to achieve rankings improvements and this insider and outsider criticism of law schools³³—some justified and some hysterical—laid the groundwork for a series of lawsuits against law schools accusing the schools of having engaged in outright fraud and deception to potential students.³⁴ The thrust of most of these suits involved inflated or misleading employment statistics reported to the authors of external rankings and published by law schools.³⁵

²⁸Gold, *supra* note 27 (“College graduates faced a poor job market and simply had nowhere to go. Many sought three years of refuge in law school, hoping that the recession would pass in the interim.”).

²⁹See TAMANAHA, *supra* note 19, at 65.

³⁰Jack Graves, *An Essay on Rebuilding and Renewal in American Legal Education*, 29 TOURO L. REV. 375, 375 (2013).

³¹TAMANAHA, *supra* note 19, at 77 (“An uproar erupted when a law professor joined the scamblog movement with an anonymous blog . . .”).

³²*Id.* (“Throughout this period, a relentless stream of invective was directed at law schools by a ‘scamblog’ movement, two dozen active blogs by recent law graduates who dedicate themselves to exposing ‘the law school scam.’”).

³³Alfred S. Konefsky & Barry Sullivan, *In This, the Winter of Our Discontent: Legal Practice, Legal Education, and the Culture of Distrust*, 62 BUFF. L. REV. 659, 661 (2014) (“A steady drumbeat in the popular press, major newspapers, the blogosphere, and scholarly interventions seems to signal that the end days are upon us.”).

³⁴See, e.g., *Harnish v. Widener Univ. Sch. of L.*, 833 F.3d 298, 302 (3d Cir. 2016).

³⁵Brian Tamanaha explains that the “doctoring” of “employment figures” used “a variety of fudges to jimmy them up.” TAMANAHA, *supra* note 19, at 71. These included reporting “jobs of any

Mostly, the lawsuits suffered a quick demise through the rejection of a request for class certification, dismissal of the lawsuits on the pleadings before discovery, and other such results.³⁶ Only one went to trial,³⁷ and judicial opinions have provided relatively limited guidance on the merits of the cases beyond that required to find a lack of sufficiency to proceed.

At base, one of the failings of these suits was their attempt to repackage the failed tort theory of educational malpractice using the language of fraud and consumer protection. Educational malpractice—the claim that a school should be liable because a student was not well taught—has largely been rejected³⁸ as a tort theory due to difficult issues in regard to defining duty³⁹

kind—not just lawyer jobs.” *Id.* Jobs such as “grocery clerk” could be categorized as “‘employed’ in ‘business and industry.’” *Id.* Schools also “left out any graduates who were ‘not seeking employment’ or were pursuing further education,” and “made less of an effort to get answers from graduates they suspected were unemployed.” *Id.* at 71–72. Law schools also “offered unemployed graduates temporary jobs—as research assistants or interns at ten dollars an hour—which expired after the period covered by the survey, thus counting them as ‘employed’ when it mattered.” *Id.* at 72.

³⁶ See *infra* Figure One. Some cases faced limited early success, such as surviving a demurrer, before failing in later stages, such as class certification. See Order Overruling Demurrer to First Amended Complaint at 4, *Arring v. Golden Gate Univ.*, No. CGC-12-517837, 2012 WL 11851945 (Cal. Super. Ct. July 19, 2012); Order Denying Motions for Class Certification at 2, *Arring v. Golden Gate Univ.*, No. CGC-12-517837, 2014 WL 6634196 (Super Ct. Cal. Aug. 11, 2014). The Golden Gate Lawsuit eventually settled at nuisance level, with five graduates receiving \$8,000 each. See Elizabeth Olson, *Law Graduate Who Sued Her School Loses at Trial*, N.Y. TIMES DEALBOOK (Mar. 24, 2016), <https://www.nytimes.com/2016/03/25/business/dealbook/law-graduate-who-sued-her-school-loses-at-trial.html>; see also Minute Order at 1, *Alaburda v. Thomas Jefferson Sch. of L.*, No. 37-2011-00091898-CU-FR-CTL, 2012 WL 6039151 (Cal. Super. Ct. Nov. 29, 2012) (denying summary judgment on some claims); Tentative Rulings, *Alaburda v. Thomas Jefferson Sch. of L.*, No. 37-2011-00091898-CU-FR-CTL, 2013 WL 12138148 (Cal. Super. Ct. Sept. 20, 2013) (denying class certification). One case, originally filed as a pro se case, survived on a single count of fraud relating to the law school’s failure to report the entering credentials relating to students admitted through an alternative pathway. *Lorona v. Ariz. Summit L. Sch., LLC*, 188 F. Supp. 3d 927 (D. Ariz. 2016). The plaintiff’s claims relating to employment statistics were dismissed. That case appears to have settled in 2017.

³⁷ The one case which went to trial resulted in a jury verdict for the defendant. See Olson, *supra* note 36.

³⁸ See Patrick F. Linehan, Note, *Dreams Protected: A New Approach to Policing Proprietary Schools’ Misrepresentations*, 89 GEO. L.J. 753, 771–72 (2001).

³⁹ See Aaron N. Taylor, *Ending the Higher Education Sucker Sale: Toward an Expanded Theory of Tort Liability for Recruitment Deception*, 2015 UTAH L. REV. 425, 426–27 (2015) (explaining that educational malpractice claims “tend to fail because courts have found it ‘extremely difficult, if not nearly impossible,’ to determine educational duty” and because “[c]ourts have . . . fashioned a host of ‘policy’ justifications for dismissing educational malpractice claims.”).

and the standard of care,⁴⁰ proximate cause and damages,⁴¹ and contributory fault.⁴² The mid-2010s law school litigation used common law and statutory misrepresentation claims as a way of asserting that particular law schools—often lower ranked and more expensive ones—failed to perform their educational mission.⁴³ But at base these were claims that the school failed to provide education at a quality level, rather than suits about deception.

The suits focused less on the transactional element of the choice to attend law school and the price paid—but instead on the poor results particular plaintiffs (or a supposed class of similarly situated law school graduates) experienced after earning their degrees. Because of that, we learned relatively little about the necessary elements of fraud cases against law schools and other institutions of higher education.

While there have been lawsuits involving deception against for-profit and trade schools, the law school litigation stands out since the defendant schools were all accredited,⁴⁴ most well established, and, in a few cases, component colleges of larger universities.

Among higher education institutions, law schools were by no means unique in their efforts to manipulate external rankings—just more aggressive and, perhaps, early adopters of misleading strategies aimed at propping up their rankings in the collective temple dedicated to the single, all-powerful deity of *U.S. News and World Report*.⁴⁵ Law schools are distinctive in that

⁴⁰ See Stijepko Tokic, *Rethinking Educational Malpractice: Are Educators Rock Stars?*, 2014 BYU EDUC. & L.J. 105, 110 (2014).

⁴¹ See *id.* at 110–11.

⁴² Todd A. DeMitchell et al., *Educational Malpractice: Is it a Tort Whose Time Has Come? An Exploratory Mixed Methods Study*, 32 U. FLA. J.L. & PUB. POL'Y 253, 286 (2022).

⁴³ See Tokic, *supra* note 40, at 110.

⁴⁴ One defendant school, Arizona Summit (formerly the Phoenix School of Law), which was sued pro se, was provisionally accredited at the time it recruited the plaintiff. *Lorona v. Ariz. Summit L. Sch., LLC*, 188 F. Supp. 3d 927, 930 (D. Ariz. 2016); Tim Eigo, *ABA Gives Nod to Phoenix Law School*, ARIZ. ATT'Y, July/Aug. 2007, at 8 (acknowledging that provisional accreditation was granted in 2007); Abigail Cahak, Note, *Beyond Brick-and-Mortar: How (Cautiously) Embracing Internet Law Schools Can Help Bridge the Legal Access Gap*, 2012 U. ILL. J.L. TECH. & POL'Y 495, 524 n.227 (2012) (demonstrating that full accreditation was not granted until 2010).

⁴⁵ I have previously suggested, a bit in jest, that we use the term “‘*Morse/U.S.News.com*’ rankings” to emphasize that “these rankings are pretty much just the work of one dude” and avoid “misleadingly evok[ing] memories of a time when there was a magazine that went by that name.” Geoffrey Rapp, *The Name Game, Law Schools, and Rankings*, PRAWFSBLAWG (Nov. 14, 2012, 3:31 PM), <https://prawfsblawg.blogs.com/prawfsblawg/2012/11/the-name-game-law-schools-and-rankings.html>. Brian Tamanaha describes the rankings as “the surviving rump of a defunct

“in this field, one ranking entity has a monopoly on public perception, and all accredited law schools are ranked together according to the same metrics.”⁴⁶ In other fields, such as business schools, there are “multiple ranking systems,” which means that “the impact of small changes in a school’s position on any one measure becomes less significant.”⁴⁷ And, with multiple ranking systems, business schools can “adopt different strategies to enhance their reputations,” which leads to “innovation, differentiation, and experimentation.”⁴⁸ Still, as this paper’s opening example illustrates, pressure to engage in deceptive practices can arise even where there are multiple external ranking systems in place.

This paper takes up a question not tested in depth in the litigation against law schools, but which could have become an issue had these cases had more merit—and may become an issue in regard to law schools or other ranked entities in the future. Does a plaintiff who has identified an actual misstatement by a higher education institution have to establish individual reliance in order to bring a claim? If so, that would effectively doom class action lawsuits based on fraud against educational providers.

Or, might the courts choose, as they once did to make private securities class actions a component of the public-private enforcement of the federal securities laws, to embrace a presumption of reliance for plaintiffs who relied not on individual deceptive disclosures but instead on the “integrity” of external rankings?

That is, should courts recognize a “fraud on the rankings” theory of reliance to support class action litigation against deceptive educational providers?

While scholars paid some attention to the law school litigation between 2011 and 2015, there has been relatively little analysis of the suits after their final resolution became clear.⁴⁹ Perhaps scholars wanted to move on from the “crisis” in legal education (particularly as enrollment at most schools began

magazine.” TAMANAHA, *supra* note 19, at 79. For the sake of brevity and simplicity, this Article uses the more common “*U.S. News* rankings” terminology.

⁴⁶ WENDY NELSON ESPELAND & MICHAEL SAUDER, ENGINES OF ANXIETY: ACADEMIC RANKINGS, REPUTATION, AND ACCOUNTABILITY 5 (2016).

⁴⁷ Rachel F. Moran, *Of Rankings and Regulation: Are the U.S. News & World Report Rankings Really a Subversive Force in Legal Education?*, 81 IND. L.J. 383, 386 (2006).

⁴⁸ *Id.*

⁴⁹ One notable exception is Mark P. Gergen, *A Wrong Turn in the Law of Deceit*, 106 GEO. L.J. 555, 557 (2018) (analyzing the shift from justifiable reliance to reasonable reliance in the law of deceit using law school litigation as an example).

to rocket up again in 2016–2021).⁵⁰ Or perhaps scholars wanted to avoid having their own home law schools come to the attention of plaintiffs' counsel who were "investigating" other potential defendants.⁵¹ That the lawsuits were unsuccessful doesn't mean that they have nothing to teach us—about tort law, deception, rankings, and the responsibilities of those in higher education to those whose debt-financed tuition payments keep them in business.

I. THE LAW SCHOOL LITIGATION

The 2012–2016 law school litigation targeted behavior of schools in connection with employment outcomes for graduates. "A tiny number [of law schools] misrepresented their employment numbers in order to boost rankings and appear more desirable to applicants."⁵² A much larger share of law schools—perhaps even a majority—"technically played within the rules but engaged in various controversial strategies,"⁵³ such as creating low-wage positions for graduates in order to improve employment outcomes.

Graduates of some twelve law schools⁵⁴ filed suit against their law schools, in most cases seeking class-action status and tens of millions of

⁵⁰*New Data Confirm Boost in Law School Attendance*, A.B.A., <https://www.americanbar.org/news/abanews/aba-news-archives/2018/12/new-data-confirms-boost-law-school/> (last visited Sept. 9, 2022); Christine Charnosky, *Law School Enrollment is Way Up—But Will the Job Market Ever be Able to Match it?*, LAW.COM (Dec. 15, 2021, 4:19 PM), <https://www.law.com/2021/12/15/law-school-enrollment-is-way-up-but-will-the-job-market-ever-be-able-to-match-it/?slreturn=20220809113706>.

⁵¹*See Law School Litigation*, LAW OFFICES OF DAVID ANZISKA, http://anziskalaw.com/Law_School_Litigation.html [https://web.archive.org/web/20150201211746/http://anziskalaw.com/Law_School_Litigation.htm] (last visited Feb. 1, 2015) (identifying twenty additional law schools not yet subject to litigation and asking graduates to complete an online form).

⁵²Gold, *supra* note 27, at 503.

⁵³*Id.* at 504.

⁵⁴*See infra* Figure One. According to various reports, defendant law schools included California Western School of Law. *12 Law Schools Sued by Graduates over Misleading Employment Data*, 19 No. 2 WESTLAW J. CLASS ACTION 3 (2012). Research via Westlaw and Pacer was unable to identify any documents associated with this case. At one point, Southwestern said, "the law school had not been served with the lawsuit," *id.* at *2, though media reports suggested the case had been filed. *Grads Sue Southwestern Law School over Employment Rate Claims*, CBS NEWS L.A. (Oct. 16, 2013, 3:07 PM), <https://losangeles.cbslocal.com/2013/10/16/grads-sue-southwestern-law-school-over-employment-rate-claims/>. The docket for the case appears to indicate the defendant's motion for a demurrer was granted.

dollars in damages.⁵⁵ Most of the targeted law schools were “private, expensive, and poorly ranked.”⁵⁶ Complaints in “most of the fifteen cases alleged that the law schools in question had reported misleading employment statistics—*e.g.*, by not disclosing ‘the number of graduates who found full-time, permanent jobs for which bar passage was required.’”⁵⁷

The plaintiffs’ stories in these cases were compelling, and in some cases tragic. One plaintiff said she and her spouse were “crippled by [her law school] loans.”⁵⁸ Another, who attended law school while serving as a caregiver for her disabled children,⁵⁹ was unable to obtain interviews even for positions that did not require admission to the bar, such as a bailiff, clerk, or paralegal.⁶⁰ Another passed the bar exam but was unable to find a law job, working instead at Pizza Hut, while trying to pay over \$190,000 in student loans.⁶¹ Another found work only as a substitute teacher, in spite of having \$120,000 in student loan debt.⁶² Another passed the bar but, unable to find legal work, voluntarily took inactive status and found work managing the delivery of telephone books.⁶³

The cases alleged a variety of state-law claims, including under consumer protection and unfair trade practices laws.⁶⁴ They also made common law claims for fraud.⁶⁵

⁵⁵ Andrew S. Murphy, Note, *Redeeming a Lost Generation: “The Year of Law School Litigation” and the Future of the Law School Transparency Movement*, 88 IND. L.J. 773, 775 (2013).

⁵⁶ *Id.* at 797.

⁵⁷ Kaela Raedel Munster, Note, *A Double-Edged Sword: Student Loan Debt Provides Access to a Law Degree but May Ultimately Deny a Bar License*, 40 J. COLL. & U.L. 285, 305 (2014).

⁵⁸ Deborah L. Cohen, *Few Jobs, but a Rack of Suits: Law Grads Claim Their Alma Maters Duped Them*, ABA J. (June 1, 2012, 8:30 AM), https://www.abajournal.com/magazine/article/few_jobs_but_a_rack_of_suits_law_grads_claim_their_alma_maters_duped_them.

⁵⁹ *See Lorona v. Ariz. Summit L. Sch., LLC*, 151 F. Supp. 3d 978 (D. Ariz. 2015).

⁶⁰ *Lorona v. Ariz. Summit L. Sch., LLC*, 188 F. Supp. 3d 927, 932 (D. Ariz. 2016).

⁶¹ *Evans v. Ill. Inst. of Tech.*, No. 1-12-3611, 2014 Ill. App. Unpub. LEXIS 2148, at *3–4 (Ill. App. Ct. Sept. 26, 2014).

⁶² *Id.* at *4.

⁶³ *MacDonald v. Thomas M. Cooley L. Sch.*, 724 F.3d 654, 659 (6th Cir. 2013).

⁶⁴ *See, e.g., id.* at 659–60.

⁶⁵ *See infra* Figure One; *Harnish v. Widener Univ. Sch. of L.*, 833 F.3d 298, 302 (3d Cir. 2016); *Lorona*, 188 F. Supp. 3d at 930; *Casey v. Fla. Coastal Sch. of L., Inc.*, No. 3:14-cv-1229-J-39PDB, 2015 U.S. Dist. Ct. LEXIS 176281, at *17 (M.D. Fla. Aug. 11, 2015), report adopted, No. 3:14-cv-1229-J-39PDB, 2015 U.S. Dist. Ct. LEXIS 176284 (M.D. Fla. Sept. 28, 2015); *Arring v. Golden Gate Univ.*, No. CGC12517837, 2014 WL 6634196, at *1 (Cal. Super. Ct. Aug. 11, 2014); *Phillips v. DePaul Univ.*, 19 N.E.3d 1019, 1023 (Ill. App. Ct. 2014); *Evans*, 2014 Ill. App. Unpub. LEXIS

Many of these claims would require the plaintiffs to establish the basic elements of misrepresentation. In its common law form, the tort of misrepresentation has two manifestations—fraud (false statements) and deceit (omission in the face of a duty to speak, including a duty to correct misleading impressions created by incomplete information).⁶⁶

Section 9 of the *Restatement (Third) of Torts: Liability for Economic Harm* provides that “[o]ne who fraudulently makes a material misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to act or refrain from acting, is subject to liability for economic loss caused by the other’s justifiable reliance on the misrepresentation.”⁶⁷ While the elements of fraud can be divided in a variety of ways, ranging from three to eleven elements across jurisdictions,⁶⁸ it is most helpful to consider the tort as comprising six required components.

First, plaintiffs would have to establish a false statement or omission. This will typically involve “misrepresentations of fact.”⁶⁹ It could also involve a “failure to disclose material information” in cases including one where a defendant has made a prior statement “and knows that it will likely mislead” or when a defendant “knows that the other party to a transaction is mistaken about a basic assumption.”⁷⁰

Many of the law school fraud cases failed because the plaintiffs failed to establish the defendant made an objectively false statement or representation.⁷¹ Even where courts found that law school data was

2148, at *1; *Johnson v. John Marshall L. Sch.*, No. 1-12-3610, 2014 Ill. App. Unpub. LEXIS 2152, at *1 (Ill. App. Ct. Sept. 26, 2014); *Bevelacqua v. Brooklyn L. Sch.*, No. 500175/2012, 2013 WL 1761504, at *4 (N.Y. Sup. Ct. Apr. 22, 2013); *Gomez-Jimenez v. N.Y.L. Sch.*, 956 N.Y.S.2d 54, 57 (N.Y. App. Div. 2012); *Austin v. Albany L. Sch. of Union Univ.*, 957 N.Y.S.2d 833, 836 (N.Y. Sup. Ct. 2013); see *Minute Order, Alaburda v. Thomas Jefferson Sch. of L.*, No. 37-2011-00091898-CU-FR-CTL, 2012 WL 6039151 (Cal. Super. Ct. Nov. 29, 2012); *MacDonald v. Thomas M. Cooley L. Sch.*, 880 F. Supp. 2d 785, 788 (W.D. Mich. 2012), *aff’d*, 724 F.3d 654 (6th Cir. 2013).

⁶⁶ *Fraud*, BLACK’S LAW DICTIONARY (11th ed. 2019); *Deceit*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁶⁷ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 9 (AM. L. INST. 2020).

⁶⁸ Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 B.Y.U. L. REV. 73, 105 (2012).

⁶⁹ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 9 cmt. c. (AM. L. INST. 2020).

⁷⁰ *Id.* § 13.

⁷¹ See, e.g., *Gomez-Jimenez v. N.Y.L. Sch.*, 943 N.Y.S.2d 834, 845 (N.Y. Sup. Ct. 2012); *Evans v. Ill. Inst. of Tech.*, No. 1-12-3611, 2014 Ill. App. Unpub. LEXIS 2148, at *19–20 (Ill. App. Ct. Sept. 26, 2014) (pleading of deception by plaintiffs was based on failure to disclose that employment statistics were based on voluntary surveys, but plaintiffs indicated they knew the information came

“unquestionably less than candid and incomplete,” it was not false because the law schools made, for instance, no representations that their job data included only legal jobs, or because law schools did disclose that data reported was based on a small sample of self-reported career outcomes.⁷² Nothing was “literally . . . false.”⁷³ The complaints attacked the employment data as “grossly inflated” but contained “no specific factual allegations supporting the conclusion that the ‘employment’ rate published . . . is false within the literal meaning of such term (*see* Black’s Law Dictionary [9th ed. 2009] [‘employment’ is ‘work for which one has been hired and is being paid’]).”⁷⁴ A person employing “basic deductive reasoning” would understand the nature of the statistics presented and not be misled.⁷⁵ Courts here seemed to endorse the view that the statements made by defendant law schools had “‘truthiness’ in the technical sense that lawyers are infamous for”; the statements were not literally false even if they were clearly not “honest.”⁷⁶

In what might be the only ultimately “successful” case, a plaintiff was able to survive (in part) a motion to dismiss fraud claims.⁷⁷ The plaintiff pointed to the school’s marketing documents, which reported average undergraduate GPAs and LSATs, but had omitted students admitted through an alternative pathway from those calculations.⁷⁸ That case was filed by a plaintiff *pro se*, was not a class action,⁷⁹ and now appears to have settled. In that case, the court found that the plaintiff had pled “reasonably specific and sufficiently plausible” fraud allegations relating to published student credentials.⁸⁰

Second, plaintiffs would have to establish materiality⁸¹—that the statement would matter to a reasonable person in the plaintiff’s position “in

from surveys, and thus “as plaintiffs admittedly were aware of the basis for the data contained in the employment information, their claims of deception regarding Kent’s failure to inform them of this basis necessarily fail.”)

⁷² *Gomez-Jimenez v. N.Y.L. Sch.*, 956 N.Y.S.2d 54, 59 (N.Y. App. Div. 2012).

⁷³ *Austin v. Albany L. Sch. of Union Univ.*, 957 N.Y.S.2d 833, 840 (N.Y. Sup. Ct. 2013).

⁷⁴ *Id.* at 840–41.

⁷⁵ *Id.* at 841.

⁷⁶ TAMANAHA, *supra* note 19, at 74.

⁷⁷ *Lorona v. Ariz. Summit L. Sch., LLC*, 188 F. Supp. 3d 927, 929 (D. Ariz. 2016).

⁷⁸ *Id.* at 935–36.

⁷⁹ *Id.* at 930.

⁸⁰ *Id.* at 935.

⁸¹ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 9 cmt. d (AM. L. INST. 2020).

deciding whether to enter into the relevant transaction.”⁸² Materiality can become “important when one party to a negotiation makes false statements to the other about a matter collateral to the immediate subject of the bargain,” and also “excludes liability for statements amounting to ‘puffery’—that is, a seller’s broad and predictably exaggerated statements about the quality of an item, as distinct from particular claims of fact.”⁸³ Puffery, simply put, “is sales talk that the buyer should discount when making a transaction because no reasonable person under the circumstances would rely on the statement when contemplating a purchase.”⁸⁴

Arguably, the law school defendants followed applicable ABA guidelines in generating their employment statistics and they published those statistics “merely . . . to pique the interest of prospective students to get them to look at” the law school “more closely,” making the statistics “analogous to a salesman puffing a good to get a purchaser to look at the good more closely.”⁸⁵ If convincing to a court, this view would favor a finding that any allegedly false statements by law schools were not “material” and amounted to little more than sales talk.⁸⁶

But the courts that discussed the issue tended to side with the plaintiffs. Courts found that “representations regarding employment statistics would be material misrepresentations to applicants for law school.”⁸⁷ Even for applicants who were only accepted to a single law school, information about employment was material because the students “still had a choice in accepting and attending” a defendant school.⁸⁸ The fact that a law school applicant would consider other information in making a choice does not lead to a different conclusion, as “plaintiffs do not need to show that the misrepresentation was the sole or predominant or decisive factor.”⁸⁹

Third, the fraud plaintiff must establish scienter—that the maker of a false statement “knows or believes that it is false,” “knowingly states or implies a false level of confidence,” or “knowingly states or implies a basis for the

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Tylka v. Gerber Prods. Co.*, No. 96 C 1647, 1999 WL 495126, at *5 (N.D. Ill. July 1, 1999).

⁸⁵ *Gergen*, *supra* note 49, at 580.

⁸⁶ *See id.* at 580–81.

⁸⁷ Minute Order at 2, *Alaburda v. Thomas Jefferson Sch. of L.*, No. 37-2011-00091898-CU-FR-CTL, 2015 WL 10634947 (Cal. Super. Ct. Dec. 28, 2015).

⁸⁸ *Id.*

⁸⁹ *Id.*

representation that does not exist.”⁹⁰ The defendant “must be shown to have had a culpable state of mind,” requiring “a conscious discrepancy between some feature of a defendant’s representation and the truth.”⁹¹ Recklessness—if it takes the form of “conscious disregard of a risk that a statement is false”⁹² can suffice to establish the needed showing on scienter. Scienter can be difficult to prove—“[m]ere evidence of a false . . . statement, without more, generally is not enough.”⁹³ To be “[s]uccessful,” a plaintiff “typically” would need to be able to produce “evidence that the defendant knew the truth and made a statement inconsistent with it.”⁹⁴ Given the lack of findings for the plaintiffs in most cases on false statements, not much of the published decisional law in the law school litigation addresses the issue of scienter.

Fourth, the plaintiffs would have to establish that the defendant had an intent to deceive. A plaintiff must show that the defendant made a statement or omission “for the purpose of influencing the plaintiff or a class of parties in which the plaintiff was included.”⁹⁵

In most states, to survive summary judgment motions, a “plaintiff must present clear and convincing evidence that the defendant had culpable intent.”⁹⁶ In many law school fraud suits, there would be “no ‘smoking gun’ or direct statements made by law schools that strongly demonstrate that they possessed the intent to deceive.”⁹⁷

None of the law school lawsuits were resolved against the plaintiffs on this issue. Courts found that the complaints “ma[d]e out a plausible claim that the defendant’s agents had culpable intent.”⁹⁸ Based on the information contained in the pleadings, “[i]t is plausible that . . . administrators” at defendant law schools “reported the employment data as they did with intent to create a false impression of the employment prospects of its graduates and with a purpose of influencing people like the plaintiffs to enroll at the school.”⁹⁹

⁹⁰ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 10 (AM. L. INST. 2020).

⁹¹ *Id.* § 10 cmt. a.

⁹² *Id.* § 10 cmt. c.

⁹³ *Id.* § 10 cmt. d.

⁹⁴ *Id.*

⁹⁵ *Id.* § 12 cmt. b.

⁹⁶ Gergen, *supra* note 49, at 580–81.

⁹⁷ Ogechi Achuko, Note, *The Blame Game: Law Students Sue Their Law Schools for Deceptive Employment Reporting Practices*, 20 VA. J. SOC. POL’Y & L. 517, 537 (2013).

⁹⁸ Gergen, *supra* note 49, at 580.

⁹⁹ *Id.*

Fifth, plaintiffs would have to establish reasonable reliance. This would require a showing that is both subjective—that the plaintiff actually did rely on the misstatement or omission—and objective—that the reliance was reasonable.¹⁰⁰

Reliance performs the role of “‘but for’ cause of the harm that the plaintiff suffered.”¹⁰¹ A plaintiff need not show that the defendant’s misstatement or omission was the *only* cause of their harm—a plaintiff who “was subject to multiple influences” can recover so long as the defendant’s fraud was a “sufficient” influence to cause the “resulting loss.”¹⁰² Reliance “means trust or confidence.”¹⁰³ Reliance means “the aggrieved party took or did not take some action out of trust or confidence in a person or a state of affairs.”¹⁰⁴

As discussed further in a later subsection,¹⁰⁵ reliance “may be indirect; in other words, the plaintiff may in some cases rely on a statement received second-hand.”¹⁰⁶ A “plaintiff need not have dealt directly with [a] defendant” in cases where a “defendant had reason to expect” a plaintiff would receive the statement, or that a defendant was aware of “a class of potential victims.”¹⁰⁷ Indirect or derivative reliance could be a proper basis for a misrepresentation claim by a plaintiff, even if the plaintiff was not specifically identified by the defendant as someone likely to receive the communication.¹⁰⁸

In a class action lawsuit against a law school, a class representative would need to “establish that the class as a whole shared the same reliance.”¹⁰⁹ This would present a significant “litigation hurdle” because reliance “is individualized and would need to be examined on a case-by-case basis.”¹¹⁰

In some cases, the law school litigation plaintiffs convinced the courts that they had in fact pled subjective reliance, identifying the specific

¹⁰⁰ Achuko, *supra* note 97, at 538.

¹⁰¹ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 11 cmt. a (AM. L. INST. 2020).

¹⁰² *Id.*

¹⁰³ John H. Matheson, *Corporate Disclosure Obligations and the Parameters of Rule 10b-5: Basic Inc. v. Levinson and Beyond*, 14 J. CORP. L. 1, 20 (1988).

¹⁰⁴ *Id.*

¹⁰⁵ *See infra* Part III.

¹⁰⁶ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 11 cmt. b (AM. L. INST. 2020).

¹⁰⁷ *Id.* § 12 cmt. b.

¹⁰⁸ *See infra* Part III.

¹⁰⁹ Munster, *supra* note 57, at 307.

¹¹⁰ *Id.*

representations on which the plaintiffs relied.¹¹¹ A court rejected the defendant's argument in one case that the class was not "ascertainable" because it sought to encompass "individuals who were never exposed to the allegedly offending marketing materials."¹¹² The court found that an argument that "the proposed class includes individuals who were not exposed to" the law school's "alleged misrepresentation[] . . . is irrelevant for ascertainability."¹¹³ In another case, however, class certification was denied due to a failure to demonstrate "common answers" as to whether the plaintiff class members "read and reasonably relied on the employment statistics at issue."¹¹⁴

To prevail, a plaintiff's reliance must be more than actual; it must also be reasonable.¹¹⁵ Reliance on false statements or deceptive omissions would not be reasonable if "common sense and outside resources" would paint for the plaintiff an accurate picture.¹¹⁶ Some commenters predicted that the law school litigation plaintiffs would be successful in pleading and proving reliance.¹¹⁷ But, the plaintiffs in some of the law school cases failed because they pointed to a single allegedly misleading set of data points, where courts found that a reasonable consumer deciding to attend law school would have consulted other sources containing more detailed information.¹¹⁸ As a result, it would not be reasonable for a plaintiff to rely on a single source of data as the "predicate" to draw "conclu[sions]" about likely outcomes from enrolling in a law school.¹¹⁹ The very fact that the employment data was reported in an

¹¹¹ See, e.g., *Gomez-Jimenez v. N.Y.L. Sch.*, 943 N.Y.S.2d 834, 853 (N.Y. Sup. Ct. 2012); *Lorona v. Ariz. Summit Law Sch., LLC*, 188 F. Supp. 3d 927, 936 (D. Ariz. 2016) ("Lorona explicitly states that she reviewed those statistics before deciding to enroll.").

¹¹² *Harnish v. Widener Univ. Sch. of L.*, Civ. No. 12-00608 (WHW) (CLW), 2015 WL 4064647, at *4 (D.N.J. July 1, 2015) (denying class certification on other grounds).

¹¹³ *Id.* at *5.

¹¹⁴ Tentative Rulings at 4, *Alaburda v. Thomas Jefferson Sch. of L.*, No. 37-2011-00091898-CU-FR-CTL, 2013 WL 12138148 (Cal. Super. Ct. Sept. 20, 2013).

¹¹⁵ *Achuko*, *supra* note 97, at 538.

¹¹⁶ *Id.* at 540.

¹¹⁷ See Joel F. Murray, *Professional Dishonesty: Do U.S. Law Schools that Report False or Misleading Employment Statistics Violate Consumer Protection Laws?*, 15 J. CONSUMER & COM. L. 97, 98 (2012) ("Prospective law students reasonably rely upon a law school's employment statistics to choose whether to attend a law school, and consequently, the reporting of false or misleading employment statistics materially affects law students.").

¹¹⁸ E.g., *Gomez-Jimenez v. N.Y.L. Sch.*, 943 N.Y.S.2d 834, 854 (N.Y. Sup. Ct. 2012).

¹¹⁹ *Id. Bevelacqua v. Brooklyn L. Sch.*, No. 500175/2012, 2013 WL 1761504, at *12 (N.Y. Sup. Ct. Apr. 22, 2013).

“inconsistent, confusing, and inherently untrustworthy” fashion would prompt a reasonable prospective law student, approaching “their decision to enter into law school with extreme caution given the size of the investment,” to ask questions about the statistics.¹²⁰ Reliance on statistics “[w]ith red flags waiving and cautionary bells ringing,” would not be reasonable.¹²¹ Consequently, the plaintiffs’ claims failed.¹²²

Mark Gergen argues that this result flows from the shift in American tort law from a requirement only of “justifiable reliance” to “reasonable reliance”:

[A] motion to dismiss would not have been granted under the old rule that treated a fraudster as liable though his victim’s reliance was unreasonable, or even reckless, if “the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.”¹²³

A plaintiff would not be doomed because of his or her “gullibility.”¹²⁴ While “plaintiffs may well have lost eventually under the old rule, they would have been given an opportunity for discovery to find evidence of culpable intent.”¹²⁵

In some cases, claims brought under state consumer protection laws did not face the obstacle associated with reliance because those laws “do not call for it.”¹²⁶ But the state consumer protection claims generally faced other obstacles in meeting the requirements of the governing statutes.¹²⁷

¹²⁰MacDonald v. Thomas M. Cooley L. Sch., 880 F. Supp. 2d 785, 796–97 (W.D. Mich. 2012), *aff’d*, 724 F.3d 654 (6th Cir. 2013).

¹²¹*Id.* at 797.

¹²²*Id.*

¹²³Gergen, *supra* note 49, at 579–80 (quoting RESTATEMENT (SECOND) OF TORTS § 538(b) (AM. L. INST. 1977)).

¹²⁴*Id.* at 580.

¹²⁵*Id.* at 577.

¹²⁶Emily Grothoff, Note, *Learning from Law Students: How PhDs Might Seek Legal Remedy in the Face of Widespread Underemployment*, 93 IND. L.J. 1299, 1303 (2018); Gomez-Jimenez v. N.Y.L. Sch., 943 N.Y.S.2d 834, 840–41 (N.Y. Sup. Ct. 2012); Austin v. Albany L. Sch. of Union Univ., 957 N.Y.S.2d 833, 842 (N.Y. Sup. Ct. 2013).

¹²⁷*Austin*, 957 N.Y.S.2d at 842.

Sixth, plaintiffs would have to establish causation of economic damages. Several of the law school fraud suits were dismissed due to a failure to show or adequately plead damages.¹²⁸ Courts found that plaintiffs “received . . . exactly what they paid for . . . they completed their legal education and obtained their J.D. degrees.”¹²⁹ Plaintiffs who claimed their damages were the difference between the “inflated” tuition paid based on false reporting and what the actual value of the degree would be were found by judges to have failed to establish a “reliable mechanism for calculating the ‘true’ value of their law degrees.”¹³⁰ Even if the plaintiffs could prevail on other elements of fraud, their claims for damages would encounter “insuperable difficulties” since any particular plaintiff’s employment outcomes are subject to a variety of factors—such as the economy—over which a law school has little control.¹³¹ Class certification was denied where plaintiffs sought to use something akin to a “fraud-on-the-market” theory to establish class-wide damages.¹³²

The issue of damages was Temple’s primary defense against the lawsuit filed by MBA graduate plaintiffs following the scandal described in this Article’s introduction. The defense argued that the plaintiffs’ claim for damages—based on inflated *U.S. News* rankings—was “purely

¹²⁸Grothoff, *supra* note 126, at 1304; *Gomez-Jimenez*, 943 N.Y.S.2d at 849 (finding plaintiffs’ claims called for “naked speculation”).

¹²⁹*Evans v. Ill. Inst. of Tech.*, No. 1-12-3611, 2014 Ill. App. Unpub. LEXIS 2148, at *28 (Ill. App. Ct. Sept. 26, 2014).

¹³⁰Grothoff, *supra* note 126, at 1304 (quoting *Phillips v. DePaul Univ.*, 19 N.E.3d 1019, 1034 (Ill. App. Ct. 2014)); *see also Evans*, 2014 Ill. App. Unpub. LEXIS 2148, at *34.

¹³¹*Bevelacqua v. Brooklyn L. Sch.*, No. 500175/2012, 2013 WL 1761504, at *9 (N.Y. Sup. Ct. Apr. 22, 2013).

¹³²*Harnish v. Widener Univ. Sch. of L.*, 833 F.3d 298, 303 (3d Cir. 2016). As the appellate court discussed, the plaintiffs in *Harnish* did not need to establish reliance since their claims sounded under state consumer protection laws that did not require a showing of reliance. Instead, their expert purported to argue that there is an “efficient market for law school tuition,” such that misleading employment statistics would have a common impact on all class members so as to allow class certification. *Id.* at 311. Courts have rejected the use of efficient markets to prove “ascertainable loss” in contexts outside of securities litigation. *Id.* And the place of “fraud on the market” in establishing loss has, of course, been called into question by the Supreme Court in the securities litigation context as well.

Following the denial of class certification, class counsel withdrew from the case and the class representative plaintiffs declined to proceed further. According to the docket, one plaintiff may have settled, though class counsel’s withdrawal motion indicated that settlement conversations with the defendant had not led to progress. *See Civil Docket, Harnish v. Widener Univ. Sch. of L.*, 833 F.3d 298 (3d Cir. 2016) (Docket: No. 2:12-cv-00608).

speculative.”¹³³ The plaintiffs argued that they would have “reduced opportunities in the workplace,” which the defense described as “speculative and conjectural on its face.”¹³⁴ That case settled prior to the court ruling on the defense motion to dismiss.¹³⁵

Other law school fraud cases did find the plaintiffs had adequately pled damages. In one case, the plaintiff claimed she had gone to law school “to get a paying job with training in law practice” but after graduation was “unemployable, not even as a paralegal.”¹³⁶ While the defendant asserted that the plaintiff “got what she paid for,” having received a law degree (and passed the bar exam), the court opined that she “received something less valuable than she paid for, much like a used car buyer who later discovers that the seller rolled back the odometer by 20,000 miles.”¹³⁷ Proving damages didn’t require a showing that she was worse off, but instead that there was a difference between “the advertised product and the actual product.”¹³⁸ The court recognized that “the fact and the amount of damage will be hard to prove and measure,” but that “[d]ifficulty in calculating damages does not amount to failure to plead damages.”¹³⁹ Similarly, although eventually denying class certification, another case denied a summary judgment motion in which the defendant argued that “the damages claim is inherently speculative.”¹⁴⁰ That court denied the motion to allow for fact-finding on the “hypothetical difference between the value of their . . . education—including the job opportunities it brings—and what they reasonably expected . . . when they enrolled.”¹⁴¹

In sum, to most of the courts considering the cases filed in the law school litigation, the plaintiffs failed to meet the necessary burden to proceed to discovery and/or trial.¹⁴² The suits were unsuccessful because “the proof

¹³³ See Motion to Dismiss Plaintiffs’ Amended Complaint at 2, *Smith v. Temple Univ.*, No. 2:18-cv-00590-CMR (E.D. Pa. June 4, 2018).

¹³⁴ *Id.* at 2–3.

¹³⁵ See *supra* note 21 and accompanying text.

¹³⁶ *Lorona v. Ariz. Summit L. Sch., LLC*, 188 F. Supp. 3d 927, 936 (D. Ariz. 2016).

¹³⁷ *Id.*

¹³⁸ *Id.* at 936–37.

¹³⁹ *Id.* at 937.

¹⁴⁰ Minute Order, *Alaburda v. Thomas Jefferson Sch. of L.*, No. 37-2011-00091898-CU-FR-CTL, 2012 WL 6039151 (Cal. Super. Ct. Nov. 29, 2012).

¹⁴¹ *Id.*

¹⁴² This result might have been anticipated by a case filed more than a decade earlier. In *Bank v. Brooklyn Law School*, a law school graduate brought RICO and fraud claims against his law

required . . . was simply not present.”¹⁴³ Fraud claims were bound to fail because of missing proof of the reasonableness of the plaintiff’s reliance on the defendant’s representations.¹⁴⁴

II. LAW SCHOOL RANKINGS

The *U.S. News* rankings of graduate programs (including law schools) was first published in 1987.¹⁴⁵ The initial rankings identified the top twenty law schools using a survey.¹⁴⁶ In 1991, the rankings first began to take on their modern form, with the addition of variables measuring post-graduate success and an expanded list of twenty-five ranked schools.¹⁴⁷ At first, the rankings included “four measures of placement success”—at-graduation employment, employment at three months, a ratio of the “number of . . . graduates to the number of employers recruiting on campus,” and average starting salary.¹⁴⁸ In 1992, the rankings expanded to list schools outside of the top twenty-five, divided into quartiles.¹⁴⁹ Over the years that followed, additional inputs were added to the rankings, such as bar passage in 1997,¹⁵⁰ and other measures were adjusted.

The *U.S. News* rankings “came to dominate the thinking of law school applicants, law firms, law professors, and any law school dean that wanted to keep th[eir] job” beginning in the 1990s.¹⁵¹ Rankings took on extreme

school. No. 97-CV-7470(JG), 2000 WL 1692844, at *3 (E.D.N.Y. Oct. 6, 2000). Plaintiff’s fraud claims failed because of a lack of support for the “inference that Brooklyn Law School knowingly or recklessly misstated the information received in response to the survey questionnaires when it reported the average salary figures to U.S. News.” *Id.* at *6. The plaintiff’s largely “conclusory allegations” also “fail[ed] to establish any conscious behavior giving rise to an inference of fraudulent intent on the part of defendant.” *Id.* at *7.

¹⁴³Munster, *supra* note 57, at 307.

¹⁴⁴*Id.* at 307–08.

¹⁴⁵ESPELAND & SAUDER, *supra* note 46, at 10 (noting a “more rudimentary version of graduate rankings” was published in 1987).

¹⁴⁶Andrew P. Morriss & William D. Henderson, *Measuring Outcomes: Post-Graduation Measures of Success in the U.S. News & World Report Law School Rankings*, 83 IND. L.J. 791, 795 (2008).

¹⁴⁷*Id.* at 797–98.

¹⁴⁸*Id.* at 797.

¹⁴⁹*Id.* at 798.

¹⁵⁰*Id.* at 821.

¹⁵¹Gold, *supra* note 27, at 499; *see also* Morriss & Henderson, *supra* note 146, at 801 (“By 1995, it was obvious to all law schools that *U.S. News* rankings defined the law school hierarchy . . .”).

importance at many if not most schools, as “[s]uccess or failure” became equated with “the slightest change in the rankings.”¹⁵² Deans get raises when rankings rise, and the same deans may be “pushed out” when their law schools “slip[] in the rankings.”¹⁵³ The rankings “have law schools by the throat.”¹⁵⁴

Rankings influence applicants’ decisions: “[T]here is substantial evidence that each year’s rankings influence the preferences of law school applicants.”¹⁵⁵ Students may “choose to attend law school for various reasons,” including perceived salaries, pop culture influence, desire to engage in public service, or “simply because they do not know what else to do.”¹⁵⁶

But rankings influence the choice of which school a particular student may attend. People “seeking to become lawyers utilize . . . rankings in assessing the caliber of law schools.”¹⁵⁷ As one set of authors put it in speculating that law school deans and others might be subject to criminal prosecution for fraud, “No one disputes that for many years the *U.S. News* rankings have influenced many students’ decisions about which schools to attend and convinced them to pay dearly for the privilege.”¹⁵⁸ Other authors have stated the case with even more force: “[R]ankings are the most influential factor used by prospective law students to decide which law school to attend.”¹⁵⁹ A “small difference[]” in rankings can affect “the perceptions of entering students.”¹⁶⁰ Or as another author put it, “[m]any prospective students believe that their future success in life depends on going to the highest-ranked law school to which they are admitted.”¹⁶¹ To a

¹⁵² Konefsky & Sullivan, *supra* note 33, at 685.

¹⁵³ Christopher D. Iacono, *Legally Unhappy: How US News and Law Schools Have Failed and How This can be Fixed*, 37 *TOURO L. REV.* 219, 222 (2021).

¹⁵⁴ TAMANAHA, *supra* note 19, at 78.

¹⁵⁵ Morriss & Henderson, *supra* note 146, at 805.

¹⁵⁶ Joshua L. Plager, Note, *All Things Equal: Unintended Consequences and Allegedly Misrepresented Statistics*, 67 *U. MIAMI L. REV.* 681, 688–89 (2013).

¹⁵⁷ Munster, *supra* note 57, at 298.

¹⁵⁸ Morgan Cloud & George Shepherd, *Law Deans in Jail*, 77 *MO. L. REV.* 931, 934 (2012).

¹⁵⁹ Achuko, *supra* note 97, at 523 (citing a Kaplan study observing that thirty-two percent of prospective law students indicated that ranking was the most critical factor in their law school decision).

¹⁶⁰ Morriss & Henderson, *supra* note 146, at 801.

¹⁶¹ Philip G. Schrag, *Failing Law Schools—Brian Tamanaha’s Misguided Missile*, 26 *GEO. J. LEGAL ETHICS* 387, 389 (2013).

“disturbing extent,” students “depend on *U.S. News* to tell them where to matriculate.”¹⁶²

Kyle McEntee and Patrick Lynch ask the rhetorical question, “[s]hould prospective[] [law students] seek the [*U.S. News*] rank of each [law] school they consider[?],” noting that law school deans will often argue that applicants should not seek such information.¹⁶³ “But in reality students do ask this question, in part because these rankings are pervasive.”¹⁶⁴ Brian Tamanaha asserts that “students rely heavily on the *US News* rankings in their decision”¹⁶⁵ about which law school to attend.

Rankings can serve as a proxy for employment outcomes given patchwork reporting even under the much-improved employment data protocols established by the ABA. A prospective law student may look to the “composite rankings”¹⁶⁶ of *U.S. News*, which do provide some limited indication of the performance of schools in different bands of rankings. But, McEntee and Lynch argue that the rankings are not a “reliable proxy” for outcomes other than in the case of a few schools.¹⁶⁷ *U.S. News* rankings “only distract sound decision-making,”¹⁶⁸ but unfortunately, prospective law students “do use the rankings in this way.”¹⁶⁹ For prospective students, the “rankings” are used “to determine which law schools are most favored by future legal employers.”¹⁷⁰

With the intense pressure to achieve and maintain rankings,¹⁷¹ some law schools began to engage in “levels of deceit that would make most boiler room operators blush.”¹⁷² Rankings-related “pressures placed on deans are

¹⁶² *Id.* at 390.

¹⁶³ Kyle P. McEntee & Patrick J. Lynch, *A Way Forward: Transparency at American Law Schools*, 32 *PACE L. REV.* 1, 17 (2012).

¹⁶⁴ *Id.*

¹⁶⁵ TAMANAHA, *supra* note 19, at 83–84.

¹⁶⁶ McEntee & Lynch, *supra* note 163, at 39.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ James E. Moliterno, *And Now a Crisis in Legal Education*, 44 *SETON HALL L. REV.* 1069, 1079 (2014).

¹⁷¹ ESPELAND & SAUDER, *supra* note 46, at 132 (“As a rule, deans of law schools are extraordinarily accomplished and ambitious people, people who haven’t failed much, people who believe that talent and hard work will carry the day. But rankings offer an alternative view: one of constraints, impotence, and even shame.”).

¹⁷² Konefsky & Sullivan, *supra* note 33, at 685.

intense.”¹⁷³ According to critics of legal education, to “improve their position in the *US News* rankings, many American law schools have played ‘fast and loose’ with figures relating to graduate employment and salaries; others have outright lied.”¹⁷⁴ Examples have included submitting inflated LSAT scores,¹⁷⁵ admitting students without required LSATs,¹⁷⁶ law schools hiring their own graduates to inflate employment statistics,¹⁷⁷ including paid employment of a non-legal nature in reporting job outcomes,¹⁷⁸ “report[ing] salary statistics based on unrepresentative samples,”¹⁷⁹ and manipulating expenditures by reporting the “market value” of services for which a law school paid a discounted rate.¹⁸⁰ Individual cases of misreporting of admissions or employment data “do[] not appear unique.”¹⁸¹

Some schools have “simply falsif[ied] data,” but more common are “schemes designed to ‘game’ the *U.S. News* methodology by submitting information that arguably was ‘true,’ but was so partial or incomplete that it created a deceptive picture of the institution, its students, and their job prospects after graduation.”¹⁸² “Gaming” has “become . . . systemic within U.S. law schools.”¹⁸³

Each year, “law schools report a variety of statistical data to *U.S. News*, such as employment and acceptance rates.”¹⁸⁴ *U.S. News* then uses “a special formula to determine rankings.”¹⁸⁵ This formula combines different data points provided by schools, weighted according to the *U.S. News* formula, in ways that “may not measure educational quality.”¹⁸⁶ The weighting of

¹⁷³ *Id.* at 685–86.

¹⁷⁴ Lawrence Donnelly, *Tamanaha and His Critics: Transatlantic Reflections on the “Crisis” in Legal Education*, 16 GERMAN L.J. 821, 828 (2015).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Ben Trachtenberg, *Law School Marketing and Legal Ethics*, 91 NEB. L. REV. 866, 890 (2013).

¹⁸⁰ Darren Bush & Jessica Peterson, *Jukin’ the Stats: The Gaming of Law School Rankings and How to Stop It*, 45 CONN. L. REV. 1235, 1255–56 (2013).

¹⁸¹ Murray, *supra* note 117, at 100.

¹⁸² Cloud & Shepherd, *supra* note 158, at 934.

¹⁸³ *Id.* at 943.

¹⁸⁴ Achuko, *supra* note 97, at 523 (italics added).

¹⁸⁵ *Id.*

¹⁸⁶ Morriss & Henderson, *supra* note 146, at 792.

various factors according to a defensible but certainly arbitrary basis¹⁸⁷ has been a longstanding criticism of the rankings.¹⁸⁸

Over the years, the rankings have undergone “extensive changes.”¹⁸⁹ At times, *U.S. News* has appeared responsive to suggestions and reasonable criticism. For instance, *U.S. News* made the decision to expand the list of ranked schools from 100 to 150, which I called for in 2010,¹⁹⁰ after noting that the rankings had accidentally presented the “third tier” and “fourth tier” in ranked order in 2008.¹⁹¹ *U.S. News* also adopted a separate ranking for part-time programs after making the decision to include part-time law students in the calculation of entering credentials, which some warned would decimate evening programs at American law schools.¹⁹² Other calls for change have gone unheeded—such as pleas to close the “transfer loophole”¹⁹³ or to shift the wording associated with the five-point scale used to measure academic reputation¹⁹⁴ or adopt a forced-distribution approach that limited the ability of voters to downgrade schools for competitive/gaming reasons.¹⁹⁵

¹⁸⁷ Kenneth Lasson, *Compelling Orthodoxy: Myth and Mystique in the Marketing of Legal Education*, 10 U.N.H. L. REV. 273, 276 (2012) (“The *U.S. News* rankings have also been compared with those of *Car and Driver*, in that both can distort data when certain variants are either not taken into account or have too much weight placed upon them.”), citing Malcolm Gladwell, *The Order of Things: What College Rankings Really Tell Us*, THE NEW YORKER (Feb. 6, 2011), <https://www.newyorker.com/magazine/2011/02/14/the-order-of-things>.

¹⁸⁸ Geoffrey Rapp, *Should US News Include an Affordability Index in its Law School Rankings?*, PRAWFSBLAWG (Apr. 7, 2010, 1:38 PM), <https://prawfsblawg.blogs.com/prawfsblawg/2010/04/should-us-news-include-an-affordability-index-in-its-law-school-rankings.html>.

¹⁸⁹ Morriss & Henderson, *supra* note 146, at 794.

¹⁹⁰ Geoffrey Rapp, *The Great Unranked: Leiter versus the “Third Tier”*, PRAWFSBLAWG (Oct. 19, 2010, 9:14 AM), <https://prawfsblawg.blogs.com/prawfsblawg/2010/10/the-great-unranked-leiter-versus-the-third-tier.html>.

¹⁹¹ Geoffrey Rapp, *US News Hacked?: Does the US News Web Site Display 3rd Tier & 4th Tier Law Schools Ranked in Order?*, PRAWFSBLAWG (Mar. 31, 2008, 5:19 PM), <https://prawfsblawg.blogs.com/prawfsblawg/2008/03/us-news-hacked.html>.

¹⁹² See ESPELAND & SAUDER, *supra* note 46, at 83. Following the change, “some schools reduced the size of their part-time divisions.” Schrag, *supra* note 161, at 390.

¹⁹³ See Schrag, *supra* note 161, at 390 n.8 (writing that “U.S. News could ‘squelch’” the practice of admitting large transfer classes to boost revenue “simply by taking LSAT scores of transfer students into account”).

¹⁹⁴ See Geoffrey Rapp, *US News Ballots are Out—Please Stop Sending Me Brochures*, PRAWFSBLAWG (Oct. 27, 2010, 1:53 PM), <https://prawfsblawg.blogs.com/prawfsblawg/2010/10/us-news-ballots-are-out-please-stop-sending-me-brochures.html>.

¹⁹⁵ See *id.*

The *U.S. News* rankings contain inputs that can be divided into four categories. “Quality Assessment” currently amounts to forty percent of the ranking score and includes the results of surveys of lawyers, judges, and selected law school faculty members and administrators.¹⁹⁶ “Placement Success” constitutes twenty-six percent of the scoring method and includes employment rate for graduates ten months after graduation, at graduation, and bar passage.¹⁹⁷ Admissions “Selectivity” represents twenty-one percent of the ranking score and includes LSAT or GRE, undergraduate GPA, and acceptance rate.¹⁹⁸ Finally, “Faculty, Law School and Library Resources” constitutes thirteen percent of the ranking score.¹⁹⁹

In submitting data to *U.S. News*, law schools are asked to verify significant year-to-year changes in particular numbers. But *U.S. News* has “not adopted methods to verify the accuracy of the data it has solicited from the [law] schools”²⁰⁰ beyond its seemingly automated requests for confirmation of notable changes. Past instances of outright fraud were not discovered by *U.S. News*; instead, the law schools “turned themselves in.”²⁰¹ Because the “rankings have become so entrenched within the legal education environment,” their “survival . . . no longer depends upon valid and accurate inputs.”²⁰²

After the ABA implemented mandatory consumer information disclosures, *U.S. News* modified the way employment data was incorporated into the *U.S. News*’s rankings, adjusting to focus on “verifiable information that was also submitted to the ABA.”²⁰³ Yet, even as the ABA modified its reporting guidance, some inputs were reported only to *U.S. News* and not subject to public disclosure—most notably today, at-graduation employment

¹⁹⁶Robert Morse et al., *Methodology: 2023 Best Law Schools Rankings*, U.S. NEWS & WORLD REP. (Mar. 28, 2022, 9:00 PM), <https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology>.

¹⁹⁷*Id.*

¹⁹⁸*Id.*

¹⁹⁹*Id.*

²⁰⁰Cloud & Shepherd, *supra* note 158, at 957.

²⁰¹Trachtenberg, *supra* note 179, at 873.

²⁰²Morriss & Henderson, *supra* note 146, at 812.

²⁰³*Id.*

rates²⁰⁴ and law school expenditures.²⁰⁵ Other than in outright cases of fraud (e.g., falsification of data reported to both the ABA and *U.S. News*), current issues surrounding “gaming”²⁰⁶ may be primarily found in regard to these two areas.

Accuracy of reporting information is not a new problem—indeed, just four years after the launch of its “composite rankings” for law schools, *U.S. News* came to believe that salary figures were overstated, which Andrew Morriss and William Henderson attribute to “systemic manipulation of a key input variable.”²⁰⁷ Twenty-seven law schools ranked in 1995 reported higher LSAT numbers to the magazine than to the ABA (which, at the time, did not require law schools to publish that information).²⁰⁸ Yet in spite of the longstanding history of problematic data submission, the issue does not appear to have gone away.

III. RELIANCE AND AGENTS, INDIRECT RELIANCE, AND DERIVATIVE RELIANCE

In the law school litigation, most plaintiffs asserted that they had directly utilized false or misleading information published by the defendant law

²⁰⁴The rankings continue to include at-graduation employment rates. See Morse et al., *supra* note 196. The ABA now only requires the submission of ten-month employment data. See AM. BAR ASSOC., ABA GUIDANCE DOCUMENT: EMPLOYMENT PROTOCOLS FOR THE CLASS OF 2022 9 (2022),

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/Questionnaires/2022/2023-employment-protocols-for-the-class-of-2022.pdf.

²⁰⁵The rankings continue to include various measures of law school expenditures. See Morse et al., *supra* note 196. The ABA, however, collects very limited data on law school finances. The instructions to the ABA Annual Questionnaire submitted by law schools provide:

Starting with the 2018 AQ, the extensive detail that was previously required regarding revenue and expenses has been replaced with the questions below. Law schools and the universities or other entities of which they are a part have a variety of accounting and budgeting practices and were often not able to match the categories that were presented previously.

AM. BAR ASSOC., PART VI: LAW SCHOOL FINANCES INSTRUCTIONS AND QUESTIONS (2022), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/Questionnaires/2022/2022-2023-aq-part-6.docx.

²⁰⁶ESPELAND & SAUDER, *supra* note 46, at 130 (“Gaming can be understood as a more or less cynical effort to manipulate the rankings data without addressing the underlying condition that is the purpose of the measure.”).

²⁰⁷Morriss & Henderson, *supra* note 146, at 801.

²⁰⁸*Id.*

schools or provided by the law schools and republished by a third party (*U.S. News*, NALP, etc.). In these cases, reliance would have been based on the plaintiffs encountering statements made by the law school.

The question posed by this paper is distinct—whether a ranking that *incorporates* information supplied by a defendant could give rise to a cause of action if a plaintiff relied not on the underlying information but on the third-party ranking.

Dean Prosser posed a seemingly straightforward question in 1966: “The defendant makes a misrepresentation of fact to A. B learns of the misrepresentation and in reliance upon it suffers loss. Under what circumstances is the defendant liable to B?”²⁰⁹ Answering this question requires considering “the interplay of a number of different factors,” producing a result “not unlike that of a man being torn to pieces by an assortment of horses.”²¹⁰

The common law allows fraud claims based on indirect, second-hand reliance. Fraud “now clearly covers cases beyond the most straightforward scenario of D uttering a misrepresentation to P, intending for P to rely on it, and inducing such reliance to P’s detriment.”²¹¹ Two further possibilities exist beyond this straightforward case—first, where the misstatement is made to a plaintiff’s agent, and the plaintiff relies upon it, and second, where the misstatement is made to a non-agent third party, but the defendant can expect that it will be repeated.

The first scenario pushes fraud beyond statements made to a plaintiff by allowing recovery by a plaintiff when a misstatement is made to the plaintiff’s agent. When a plaintiff has employed an agent, fraud against the agent dealing on behalf of a principal gives rise to a claim of fraud by the principal as plaintiff. The *Restatement (Second) of Agency* addresses “Third Person Fraudulent” circumstances²¹²: “A person who fraudulently . . . enters into a transaction with[] an agent acting within the scope of his power to bind the principal . . . is subject to liability to the principal whether the fraud is practiced upon the agent or upon the principal.”²¹³ In tort, this gives the principal a cause of “action in deceit . . . or other remedies obtained through

²⁰⁹William L. Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231, 231 (1966).

²¹⁰*Id.* at 232.

²¹¹John C.P. Goldberg et al., *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1006 (2006).

²¹²RESTATEMENT (SECOND) OF AGENCY § 315 (AM. L. INST. 1958).

²¹³*Id.*

judicial action.”²¹⁴ Fraud “directed towards the agent,” such as “misrepresentation[] concerning goods” sold by a third party “to the agent,” is fraud against the principal, “whether the principal is disclosed, partially disclosed, or undisclosed.”²¹⁵

For example, in investor fraud cases where plaintiffs could not utilize the fraud-on-the-market presumption of reliance, fraudulent statements by a defendant to plaintiffs’ investment advisor²¹⁶ or accountant²¹⁷ were sufficient to empower plaintiffs to bring a fraud action. Courts have noted that “[u]nder well-settled principles of agency law, one who defrauds an agent is liable to the principal” and “a principal may sue when it is his agent who has been defrauded.”²¹⁸ “[P]laintiffs need only allege that an agent acting on their behalf reasonably relied on the alleged misrepresentations of the defendants.”²¹⁹

Outside of the investor fraud context, this rule has been applied: to medical device litigation (where a misrepresentation was made to a physician and a plaintiff patient was injured),²²⁰ to asbestos litigation (where a misrepresentation was made to an architect and plaintiff school district was injured),²²¹ and to real estate transactions (where a misrepresentation was made to a realtor and injured plaintiff property owner).²²²

The second scenario pushing beyond the straightforward case of misrepresentation directed at the plaintiff involves a misrepresentation made to a third-party non-agent and then relied upon by the plaintiff. In the past, the *Restatement of Torts* endorsed the idea that a person could be liable for misrepresentation based on communications to a non-agent that are intended to or expected to be repeated. Section 533 of the *Restatement (Second) of Torts* provides that “[t]he maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another” even where the misrepresentation is “not made directly to the other” but is “made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the

²¹⁴*Id.* § 315 cmt. a.

²¹⁵*Id.* § 315 cmt. b.

²¹⁶*In re Fine Host Corp. Sec. Litig.*, 25 F. Supp. 2d 61, 71–72 (D. Conn. 1998).

²¹⁷*ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 489 S.E.2d 470, 472 (S.C. 1997).

²¹⁸*In re Fine Host*, 25 F. Supp. 2d at 71.

²¹⁹*Id.* at 71–72.

²²⁰*See Michael v. Shiley, Inc.*, 46 F.3d 1316, 1335 (3d Cir. 1995).

²²¹*Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 407 S.E.2d 860, 861 (N.C. Ct. App. 1991).

²²²*Liberty Nat’l Bank & Tr. Co. v. Gruenberger*, 477 S.W.2d 503, 505 (Ky. 1972).

transaction or type of transaction involved.”²²³ The maker of the false statement is liable even if he or she does not have “any particular person in mind” as the recipient of information passed to a third party.²²⁴ There are “a good many cases, all of them holding that the plaintiff can recover,” in areas in which the plaintiff is an unidentified member of a group or class and the defendant’s purpose is to influence any of its members.”²²⁵

The statement need not be repeated directly—it is enough that the speaker “makes a misrepresentation to one group intending to influence the behavior of the ultimate purchaser, and that he succeeds in this plan.”²²⁶ But Section 533 does appear to, in most cases that don’t involve an agent, require that some “substance” regarding the misrepresentation be repeated to the plaintiff. What can be called “indirect reliance” does require that a plaintiff “considers the actual content” of the statement made and then passed down through third parties.²²⁷

²²³ RESTATEMENT (SECOND) OF TORTS § 533 (AM. L. INST. 1977).

²²⁴ *Id.* § 533 cmt. g.

²²⁵ Prosser, *supra* note 209, at 243.

²²⁶ *Comm. on Child.’s Television, Inc. v. Gen. Foods Corp.*, 673 P.2d 660, 674 (Cal. 1983) (“Repetition . . . should not be a prerequisite to liability . . .”). Later decisions have called into question whether *Children’s Television* should be read to have adopted that position. The case used “a single, enigmatic sentence whose interpretation has spawned considerable debate.” *Mirkin v. Wasserman*, 858 P.2d 568, 577 (Cal. 1993). If *Children’s Television* had,

intended to announce such a drastic change to settled law on a point as important as the nature of reliance in an action for deceit, one would expect to see the announcement of the new rule to be supported with reasons and the citation of authority. Instead, one finds only a single sentence, unsupported by reasoning or authority and phrased in tentative language: “Repetition . . . should not be a prerequisite to liability.”

Id. at 577–78 (alteration in original). Other courts have rejected *Mirkin*’s limited reading, however, siding with the *Mirkin* dissent’s broader interpretation of *Children’s Television*. For example, the court in *Kaufman* noted that in *Mirkin*:

[T]wo justices vigorously dissented, pointedly noting that “a defendant’s misrepresentation may be an ‘immediate cause’ of a plaintiff’s injury-producing conduct even though the defendant did not make the misrepresentation directly to the plaintiff, and even though the plaintiff never heard or read the precise words of the misrepresentation.” We are satisfied that the *Mirkin* dissent properly interprets the principles of indirect reliance reflected in . . . section 533 of the *Restatement of Torts* . . .

See, e.g., *Kaufman v. i-Stat Corp.*, 735 A.2d 606, 611 (N.J. Super. Ct. App. Div. 1999) (quoting *Mirkin*, 858 P.2d at 586 (Kennard, J., concurring and dissenting)) (citation omitted).

²²⁷ *Brown v. Philip Morris Inc.*, 228 F. Supp. 2d 506, 519 (D.N.J. 2002).

Whether it would be enough to establish reasonable foreseeability of repetition—as opposed to “reason to expect” repetition—is left open. The *Restatement (Second) of Torts* expresses “no opinion on whether the liability of the maker of a fraudulent representation may extend . . . to other persons or other types of transactions, if reliance upon the representation in acting or refraining from action may reasonably be foreseen.”²²⁸

The *Restatement (Third) of Torts* continues to adhere to this general framework in Section 12. The more general language of the section provides that an actor is subject to liability for harm for misrepresentation if the “risk of the harm was foreseeably increased” by the misrepresentation.²²⁹ To recover, the comments clarify, a plaintiff “need not have dealt directly with the defendant.”²³⁰ It is enough that a “defendant had reason to expect that the plaintiff would receive the statement and rely on it.”²³¹

Perhaps most applicable to false statements law schools might make to the publisher of external rankings—one common context in which fraud to a third party has been said to be actionable involves misrepresentations to a credit-rating company.²³² Where a person makes a misrepresentation “to a credit-rating company for the purpose of obtaining a credit rating based on them,” that person “is subject to liability to any person who may be expected to and does extend credit to him in reliance upon the erroneous rating so procured.”²³³ This is so even though the “rating company does not communicate the figures misstated by the maker of the misrepresentations.”²³⁴ That a credit rating “summarize[s] with reasonable accuracy” or “expresses the effect of the misstatements made” is sufficient.²³⁵ A plaintiff could proceed based on fraudulent statements made to a rating agency even if the plaintiff is not itself extending credit to the maker of the fraudulent statement, so long as plaintiff is dealing with the defendant “in any one of the ways in which the [defendant’s] financial position is material.”²³⁶ As Prosser summarized, “[t]here is liability for deceit when false statements as to credit are made to a commercial credit agency, for the purpose of

²²⁸ RESTATEMENT (SECOND) OF TORTS § 533 Caveat (AM. L. INST. 1997).

²²⁹ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 12 (AM. L. INST. 2020).

²³⁰ *Id.* § 12 cmt. b.

²³¹ *Id.*

²³² RESTATEMENT (SECOND) OF TORTS § 533 cmt. f. (AM. L. INST. 1977).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

reaching its subscribers, or even others, in order to obtain credit from them.”²³⁷

“Credit rating agencies (CRAs) evaluate the creditworthiness of financial instruments or the issuers of such instruments.”²³⁸ In the corporate context, credit rating agencies “gather information about issuers and securities, analyze that information, formulate opinions about those issuers and securities and broadly disseminate those opinions.”²³⁹ Investors, lacking “the capacity or time to examine and evaluate the quality of financial instruments or the creditworthiness of the issuer of such instruments, use the ratings issued by CRAs to make investment decisions.”²⁴⁰

Courts have found that the ratings produced by CRAs are not protected “opinions regarding future valuation” but instead “statements analyzing current worth.”²⁴¹ These represent not “pure statements of either fact or opinion but rather . . . a hybrid of the two.”²⁴² “Ratings should best be understood as *fact-based opinions*.”²⁴³

Plaintiff would need to establish two things to bring a claim of fraud based on misrepresentations a defendant made to a credit rating agency—first, that the plaintiff relied on the assigned rating, and second that the deception affected the rating, which is to say that the rating agency “would have assigned a different rating (or not assigned a rating at all)” if not for the deception.²⁴⁴ Reliance on the credit rating incorporating a misstatement would then be actionable even for a plaintiff who “never received th[e] misrepresentations directly.”²⁴⁵

IV. FRAUD ON THE MARKET

Fraud on the market (“FOTM”) is no doubt familiar to most law students from an introductory course in corporate law. Rather than prove individual

²³⁷ Prosser, *supra* note 209, at 243 (collecting cases) (footnotes omitted).

²³⁸ Jan De Bruyne, *How the Threat of Holding Credit Rating Agencies Liable Might Increase the Accuracy of Their Ratings*, 52 WILLAMETTE L. REV. 173, 174 (2015).

²³⁹ *In re Enron Corp. Sec., Derivative & “ERISA” Litig.*, 511 F. Supp. 2d 742, 809–10 (S.D. Tex. 2005).

²⁴⁰ De Bruyne, *supra* note 238, at 174.

²⁴¹ *Abu Dhabi Com. Bank v. Morgan Stanley & Co.*, 888 F. Supp. 2d 431, 453 (S.D.N.Y. 2012).

²⁴² *Id.* at 454.

²⁴³ *Id.* at 455.

²⁴⁴ *In re Nat’l Century Fin. Enters., Inc.*, 846 F. Supp. 2d 828, 914 (S.D. Ohio 2012).

²⁴⁵ *Ritter v. Klisivitch*, No. 06-CV-5511(DRH)(WDW), 2008 WL 2967627, at *15 (E.D.N.Y. July 30, 2008).

reliance, FOTM allows class action private securities fraud plaintiffs to assert that “all investors rely on the market price when making a purchase decision, so that if the market price reflected the effects of an omission or misstatement, then every investor could be presumed to have relied on information that incorporated that omission or misstatement.”²⁴⁶ This relieves plaintiffs in a class action securities fraud suit from showing that “each and every potential class member read the document with a misstatement or the portion of the document where the omitted material should have been included.”²⁴⁷

Fraud on the market has been described as an “artifact of history.”²⁴⁸ Its foundation is the idea that the securities laws “need a private enforcement mechanism and that the class action is the procedural mode best suited for that purpose.”²⁴⁹ But, the common law of fraud, which “presupposes parties dealing face-to-face and requires a showing of reliance on the misrepresentation” presents an obstacle which cannot be overcome “as a practical matter in a class action.”²⁵⁰ Without FOTM, a plaintiff would need to satisfy the reliance element of common law deceit—showing that “the investor’s decision to trade was affected by the omission or misstatement (also sometimes called transaction causation).”²⁵¹ This would be “at best a tedious proposition” for plaintiffs and their class counsel.²⁵²

The Supreme Court adopted FOTM in 1988 in *Basic Inc. v. Levinson*.²⁵³ A steel corporation²⁵⁴ engaged in secret conversations beginning in 1976 regarding a potential sale to another entity; the resulting tender offer²⁵⁵ would be expected to drive up prices of the acquired corporation’s stock. In 1977 and 1978, in the face of unusually heavy trading (presumably as insiders and tippees sought to acquire shares to profit off the eventual sale of the business), corporate executives denied that they could explain the trading and denied

²⁴⁶Frederick C. Dunbar & Dana Heller, *Fraud on the Market Meets Behavioral Finance*, 31 DEL. J. CORP. L. 455, 458 (2006).

²⁴⁷*Id.*

²⁴⁸William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PA. L. REV. 69, 73 (2011).

²⁴⁹*Id.* (footnote omitted).

²⁵⁰*Id.*

²⁵¹Dunbar & Heller, *supra* note 246, at 458.

²⁵²*Id.* at 461.

²⁵³485 U.S. 224, 250 (1988).

²⁵⁴*Id.* at 226.

²⁵⁵*Id.* at 228.

that they were engaged in merger conversations.²⁵⁶ The executives made three denials—one, in an article in the *Cleveland Plain Dealer*, the second, in a release issued following a New York Stock Exchange inquiry, and a third, in a 1978 “Nine Months Report.”²⁵⁷

Some stockholders sold their shares before the merger was announced; had they held on longer, they would have enjoyed hefty profits, the loss of which constituted their claim for damages.²⁵⁸ But the problem was that many investors would not have been able to show that they read the corporate executives’ denials and thus relied upon the false statements.²⁵⁹ FOTM provided an answer.

The FOTM solution adopted by the Supreme Court in *Basic*²⁶⁰ to this reliance problem did not expressly acknowledge the practical foundations of the FOTM rule; instead, it “patched over the problem by relaxing the reliance requirement.”²⁶¹ The efficient market hypothesis supporting FOTM was adopted not because of the strength of the underlying economic theory cited by the Supreme Court, but instead because of the “need for the efficient market hypothesis to solve a procedural problem.”²⁶²

Without FOTM, it would be difficult for class action plaintiffs to establish reliance. Each plaintiff could submit an affidavit certifying “that he or she read the document that contained the misstatement.”²⁶³ If accepted by the court, this would be a “time-consuming” though not incredibly difficult task.²⁶⁴ But if a court requires that plaintiffs’ affidavits certify *when* they read the document and “how it fits into their investment decisions, then the task becomes more cumbersome.”²⁶⁵ Boilerplate descriptions might be read by a court as “an attempt to avoid an inquiry into whether each individual plaintiff actually considered the information under consideration,” while individualized descriptions “for each affidavit . . . would become a more

²⁵⁶ *See id.* at 227 n.4.

²⁵⁷ *Id.*

²⁵⁸ *See id.* at 228.

²⁵⁹ *Id.* at 242 (“Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones.”).

²⁶⁰ *Id.* at 248–50.

²⁶¹ Bratton & Wachter, *supra* note 248, at 74.

²⁶² Dunbar & Heller, *supra* note 246, at 457.

²⁶³ *Id.* at 461.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

burdensome undertaking.”²⁶⁶ And more problematic than workload, individual descriptions could undercut the requirement for class certification that “the claims . . . of the representative parties are typical of those of the class.”²⁶⁷

The solution to these practical problems was FOTM, which flowed out of academic research on whether investors could beat the market in the face of indications that stock prices tend “to follow a random walk with a drift equal to the average return.”²⁶⁸ Under the “Semi-Strong Form” of the Efficient Market Hypothesis developed by this research, the “price of [a] stock incorporates accurately all past information” of a “publicly available” nature.²⁶⁹

In *Basic*, the Supreme Court “accepted that securities prices *accurately* reflect all publicly available information about the *value* of a security and investors have a right to expect that publicly available information is accurate and reasonably complete.”²⁷⁰ An investor is presumed to “rely on prices in the market as reflecting truthful statements free of material omissions.”²⁷¹ The Court described the market as “acting as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price.”²⁷²

The view that securities markets operate as agents of an investor represents FOTM’s embrace of the concept of “derivative reliance—the efficient market acts as the third-person upon whom the plaintiff relies.”²⁷³ FOTM is “derivative reliance” taken “to its logical conclusion.”²⁷⁴ Reliance “is traced through third parties, such as stockbrokers, relatives, or friends,”

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 462.

²⁶⁹ *Id.* at 462–63.

²⁷⁰ *Id.* at 465.

²⁷¹ *Id.*

²⁷² *Basic Inc. v. Levinson*, 485 U.S. 224, 244 (1988) (quoting *In re LTV Sec. Litig.*, 88 F.R.D. 134, 143 (N.D. Tex. 1980)).

²⁷³ Daniel S. Kahn, *The Collapsing Jurisdictional Boundaries of the Antifraud Provisions of the U.S. Securities Laws: The Supreme Court and Congress Ready to Redress Forty Years of Ambiguity*, 6 N.Y.U. J.L. & BUS. 365, 388 (2010).

²⁷⁴ Matheson, *supra* note 103, at 21.

and “[a]s a result of this derivative reliance, the reliance requirement logically has been extended further down the causal chain.”²⁷⁵

FOTM provides a presumption of reliance allowing class actions “against those who make false and misleading statements about publicly traded securities.”²⁷⁶ The common law requirement of reliance disappears with FOTM; instead, class members “benefit from a rebuttable presumption of reliance on the integrity of the market price, which is grounded in the assumptions that the price of an actively traded stock reflects available public information and that misinformation can impair the price’s accuracy.”²⁷⁷ Without FOTM, a defendant would be able to “make a reasonable claim that individual issues of reliance would require separate trials for each plaintiff.”²⁷⁸ The Supreme Court “made a policy decision to promote the deterrence effect of private rights of action under the securities laws.”²⁷⁹ With FOTM, “individual investors do not have to make separate showings of reliance,” and “common issues of proof for all traders over the period of the fraud predominate,” making “class certification an easier matter.”²⁸⁰ In a practical sense, class actions would be “virtually impossible” in securities litigation, since “individual questions of reliance would predominate over any common questions.”²⁸¹

The FOTM presumption provides “the necessary *transaction* causation element for class certification in the assertion of claims under section 10(b) and Rule 10b-5.”²⁸²

Criticism of the FOTM presumption of reliance is extensive. While the *Basic* court could opine that “[c]ommentators generally have applauded the adoption of one variation or another of the fraud-on-the-market theory,”²⁸³ the decision would soon come to be subject to significant, if not withering, academic and scholarly criticism and repeated attacks in the courts.

²⁷⁵L. Brett Lockwood, Comment, *The Fraud-on-the-Market Theory: A Contrarian View*, 38 EMORY L.J. 1269, 1277 (1989).

²⁷⁶Bratton & Wachter, *supra* note 248, at 82.

²⁷⁷*Id.* at 82–83 (footnote omitted).

²⁷⁸Dunbar & Heller, *supra* note 246, at 457.

²⁷⁹*Id.* at 458.

²⁸⁰*Id.* at 466.

²⁸¹Robert N. Rapp, *Plausible Cause: Exploring the Limits of Loss Causation in Pleading and Proving Market Fraud Claims Under Securities Exchange Act § 10(b) and SEC Rule 10b-5*, 41 OHIO N.U. L. REV. 389, 392 (2015).

²⁸²*Id.*

²⁸³*Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988).

The first criticism relates to the Efficient Markets Hypothesis that the *Basic* court identified as the basis for FOTM. During the “explosive growth phase in technology stock prices in the late 1990s,” the academic consensus that securities markets accurately reflect publicly available information (including fraud) began to disintegrate, with scholars observing what “appeared to be mispricing.”²⁸⁴ Academic research began to “pose puzzles that the efficient markets proponents have not explained satisfactorily.”²⁸⁵ While the literature continues to debate the issue, if one believes that “certain actively-traded securities at certain times do not obey the rules of an efficient market . . . then it is difficult to understand why the presumption of reliance should not be rejected.”²⁸⁶

This criticism likely could have been avoided had the *Basic* decision been more cautious in its description of the academic support “confirm[ing]” the Efficient Markets Hypothesis.²⁸⁷ FOTM can be defended even without that strident belief. Instead, one might adopt a more cautious view—that “efficiency is not an on-off switch, but rather exists along a continuum.”²⁸⁸ Since reliance is really an inquiry into “but-for” causation, the presumption could be justified so long as the market is efficient enough that “an investor would be *justified* in relying on the . . . market price.”²⁸⁹ A market need not be perfectly efficient and “[t]he precise *extent* to which the price was affected by the fraud is irrelevant to the reliance question,” since “[r]eliance on the integrity of the market price invariably will result in reliance on a defendant’s [false or misleading] statements” or omissions.²⁹⁰ Moreover, FOTM may be justified because “reasonable investors behave *as if* the market were efficient,” making the presumption appropriate.²⁹¹

Other criticisms of FOTM are really criticisms of private securities litigation. For instance, perhaps the most damning criticism of private securities litigation is its “circularity” feature²⁹²—shareholders are the

²⁸⁴ Dunbar & Heller, *supra* note 246, at 471.

²⁸⁵ *Id.* at 476.

²⁸⁶ *Id.* at 532.

²⁸⁷ 485 U.S. at 246.

²⁸⁸ Bradford Cornell & James C. Rutten, *Market Efficiency, Crashes, and Securities Litigation*, 81 TUL. L. REV. 443, 448 (2006).

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 449.

²⁹¹ *Id.* at 456.

²⁹² See generally James Cameron Spindler, *We Have a Consensus on Fraud on the Market—and It's Wrong*, 7 HARV. BUS. L. REV. 67, 86–91 (2017) (discussing the circularity critiques).

supposedly wronged party, but since class actions target issuers rather than individuals responsible for false statements, the end result is that shareholders “bear the costs of the payments.”²⁹³ A diversified investor is just as likely to be the loser in securities fraud claims as to be the winner. But this is not a criticism of FOTM, even if sometimes described as one.²⁹⁴

Similarly, FOTM is not to blame for the structural incentives in securities litigation which favor settlements rather than resolution in trial.²⁹⁵

In the face of these criticisms, the Supreme Court has continued to adhere to the FOTM presumption of reliance. In *Halliburton II*²⁹⁶ in 2014, the Court found “no sufficient justification for overruling *Basic*’s presumption of reliance.”²⁹⁷ The Court did sensibly adopt a position developed in lower court decisions that allowed “defendants to introduce evidence at the class certification stage rebutting the *Basic* presumption by showing that the alleged misrepresentation did not impact the price of the security.”²⁹⁸ But the Court left in place FOTM as a principal component of the private securities litigation toolkit.

V. TOWARDS FRAUD ON THE RANKINGS

Fraud on the rankings—FOTR—would be a presumption of reliance plaintiffs in an individual or class action could invoke against a law school or other higher education institution based on deceptive reporting to an external ranking a defendant had reason to expect would be relied upon by the members of the class of applicants in making their enrollment decisions.

FOTR would resemble FOTM in that the rankings would serve as an “unpaid agent” for a prospective student in the same way the securities market serves as an unpaid agent for investors. To be sure, courts have rejected the application of FOTM to common law fraud claims involving securities.²⁹⁹ FOTM for federal securities actions is thought to be justified by

²⁹³ Bratton & Wachter, *supra* note 248, at 100.

²⁹⁴ *Id.* (“FOTM is supposed to compensate shareholders for damages, but it fails . . .” because shareholders “bear the costs of the payments.”).

²⁹⁵ *See id.* at 101.

²⁹⁶ *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014).

²⁹⁷ Rapp, *supra* note 281, at 398.

²⁹⁸ Eric C. Chaffee, *An Oak is an Oak is an Oak is an Oak: The Disappointing Entrenchment in Halliburton Co. v. Erica P. John Fund of the Implied Private Right of Action Under Section 10(b) and Rule 10b-5*, 9 N.Y.U. J.L. & LIBERTY 92, 99 (2015).

²⁹⁹ *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 11 cmt. b. (AM. L. INST. 2020).

the importance of class actions in deterring securities fraud in the face of limited federal enforcement resources. The case law defining the limits of FOTM, however, is itself fairly limited.³⁰⁰ Most of these cases involved securities claims and were brought as state law claims to avoid particular components of federal reform statutes thought to limit success in the federal courts. The state courts have been understandably reluctant to expand fraud claims where plaintiffs seemed to be choosing state law to avoid the impact of federal reforms. Nor should the rejection of FOTM outside the securities context mean that the common law of indirect or derivative reliance cannot be interpreted to give rise to an agent-based reliance claim in other contexts.

In order to justify FOTR, it would be necessary to establish that a defendant's false statement or omission as to a matter of material fact was incorporated into the rankings relied upon by a plaintiff or a plaintiff class. An initial challenge is that rankings themselves are opinions. Courts have held that rankings are opinions in the context of defamation.³⁰¹ Opinions, including puffery and sales talk, are not a proper basis for a fraud claim in that they do not constitute false statements of fact, are not material, and cannot be relied upon reasonably in making a decision. Like a credit rating assigned to an investment product, a ranking is a "protected expression of opinion."³⁰² Primarily, this serves to protect the party producing the ranking from a cause of action for misrepresentation. The rankings producer makes opinion-based choices in regard to how to structure the rankings, weight the different components, and even on such matters as how many organizations to rank and how to name or describe the ranking provided.

But saying that a ranking is a statement of opinion is incomplete. Rankings are opinions in the same way a creditworthiness determination by a credit rating agency is an opinion. They are opinions that incorporate facts. A ranking could present a false representation of the world in one of two ways. First, a party that publishes a ranking asserting its opinion could engage in deception if that party does not actually hold that opinion. A ranking makes

³⁰⁰The Restatement notes three cases. *See* *Aubrey v. Sanders*, 346 F. App'x 847 (3d Cir. 2009); *Kaufman v. i-Stat Corp.*, 754 A.2d 1188 (N.J. 2000); and *Mirkin v. Wasserman*, 858 P.2d 568 (Cal. 1993).

³⁰¹*See* *Seaton v. TripAdvisor, LLC*, No. 3:11-CV-549, 2012 WL 3637394, at *6 (E.D. Tenn. Aug. 22, 2012). The rankings in that case, however, were based on customer reviews rather than identifiable fact—thus, in essence, the rankings were opinions based on *opinion*, rather than opinions consisting of an identifiable set of factual measures.

³⁰²*Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Inv.'s Servs., Inc.*, 175 F.3d 848, 856 (10th Cir. 1999).

an implicit statement, “*this is what I believe*,” which, if false, would be a misrepresentation. Second, a ranking presents embedded factual statements through a formula constructed in an opinion. If a ranking makes use of four categories of factors, like *U.S. News* does in its rankings of law schools, and the factual information included in the ranking is false, the ranking has incorporated the facts and, whether republishing the specific information or not, the ranking has presented an amalgamated description of a ranked entity that does not represent reality.

FOTR would utilize the common law principle of derivative or indirect reliance articulated in the *Restatement (Second) of Torts*. The law school submitting false information to *U.S. News* has reason to expect that a class of persons consisting of prospective law students will receive the “substance” of the false information, incorporated into the ranking according to a semi-accessible formula. The law school submitting false information intends that the prospective law students will incorporate the false information, as manifested in the law school’s ranking, in their decision-making.

To prevail using FOTR, plaintiffs would need to establish that reliance upon the ranking was reasonable and that they actually relied upon the ranking. Here, law school graduates could point to the fact that prospective students lack the “capacity or time” to evaluate the “quality” of a legal education program just like investors lack the time to evaluate the creditworthiness of corporations that issue financial instruments³⁰³ Based on that lack of time, it is reasonable for investors to rely on a Credit Rating Agency’s determination of creditworthiness and, by the same token, for a prospective law student to rely upon a law school’s ranking as reflecting the truth of the items included in the ranking.

Like FOTM, a FOTR would be a *rebuttable* presumption. Not all investors rely on market price before making purchase or sale decisions. Similarly, not all law students rely upon rankings in making choices—some choose law schools based on geographic constraints, others based exclusively on affordability, and others still based on “family traditions or personal commitments.”³⁰⁴

Similarly, defendants could seek to rebut a presumption of reliance on the rankings by demonstrating that, in regard to a particular misrepresentation made by a law school to *U.S. News*, the misrepresentation had no impact on the school’s ranking. For instance, if a school ranked 39th misrepresented its

³⁰³ De Bruyne, *supra* note 238, at 174.

³⁰⁴ Cloud & Shepherd, *supra* note 158, at 954.

LSAT medians, but the correct report would not have changed its ranking, then FOTR would not be appropriate because submission of accurate information would not have altered the resulting ranking and therefore could not have influenced a prospective law student's decision.³⁰⁵

Just as securities markets—or at least, well-developed securities markets—incorporate public information in setting the price of a stock, rankings incorporate information provided by the schools in constructing a ranking. When the submitted data is unreliable or falsified, that “impacts the value assessment . . . by misleading applicants with respect to the costs and benefits of legal education.”³⁰⁶

The choice of different weights, arbitrary at best³⁰⁷ and self-serving at worst,³⁰⁸ means that rankings may not precisely reflect the “value” or quality of the subject's ranking. But, just as is the case with securities prices, rankings can operate in a self-fulfilling fashion. The market price of a security does not always—and may not usually—reflect a statement of the “true worth” of a fractional interest in a business enterprise.³⁰⁹ But at the same time, the stock price does represent the true worth of a share in the sense that the stock price is the price at which, at a given moment in time, someone can purchase or sell a share in a reasonably liquid market.

Rankings reflect “true quality” in this same sense.³¹⁰ The opinion-based result of weighted factual factors included in a ranking may have only a tangential connection to the actual quality of the experience a student would

³⁰⁵In at least one past instance (Illinois allegedly misreporting LSATs and undergraduate GPAs in four years of submissions to *U.S. News*), *U.S. News* rankings boss Robert Morse suggested that “any change in [the] University of Illinois College of Law's . . . ranking due to the altered statistics would have been minor because little difference existed between the reported and actual scores used to compile the 2012 list.” Christopher Polchin, Comment, *Raising the “Bar” on Law School Data Reporting: Solutions to the Transparency Problem*, 117 PENN ST. L. REV. 201, 207 (2012).

³⁰⁶Anglade, *supra* note 19, at 908.

³⁰⁷See Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229, 245 (2006) (“Many of these criteria are of no inherent interest to the readers of the rankings.”).

³⁰⁸See Scott Baker et al., *The Rat Race as an Information-Forcing Device*, 81 IND. L.J. 53, 81 (2006) (“*U.S. News* is an external player, an outsider, who seized a gap in the market. The rankings may be highly flawed, but there has been customer demand for them. *U.S. News* . . . profit[s] increasingly as more consumers focus attention on their rankings . . .”).

³⁰⁹See Paul G. Mahoney, *Precaution Costs and the Law of Fraud in Impersonal Markets*, 78 VA. L. REV. 623, 661 (1992) (explaining that securities markets have various tools which can be “respectable, if often criticized, methods of measuring a stock's” value).

³¹⁰See TAMANAHA, *supra* note 19, at 80 (“[T]he ranking creates its own reality.”).

have if attending the ranked school. For instance, the number of books in a law library may not mean much about the quality of a law school in an era of digital legal research. But like the market price of a security, once entities are ranked in a certain way, the ranking becomes part of the “true quality” of the program ranked.³¹¹

The ranking itself becomes the value of a ranked entity. While rankings are “far from perfectly correlated” with “employment prospects,”³¹² rankings are taken seriously not just by students, faculty, and law school deans, but also by “legal employers[] and alumni.”³¹³ Legal employers “use[] the rankings to make hiring decisions and judge the quality of law graduates on the strength of their legal education.”³¹⁴

To provide a basis for FOTR, rankings don’t have to be “correct”—just “correct enough” that a person would be justified in relying on them to make a choice about a law school. And a presumption of reliance is appropriate even if rankings are not perfectly accurate if a reasonable future law student behaves as if they are accurate. Certainly, the evidence supports the view that “normal” prospective law students heavily weigh rankings. Reasonableness does not mean brilliance. If an ordinary, normal way of choosing a law school is to focus on rankings,³¹⁵ then a presumption that a student’s choice was in reliance on rankings reflecting information submitted by law schools is just as appropriate as a presumption that an investor traded a security based on price. Reasonable investors act like markets are “efficient enough” to incorporate publicly available information; reasonable prospective law students may act (and would, in fact, be rational in acting) as if rankings are “accurate enough.”

Some courts have questioned whether any reasonable consumer would rely upon a ranking.³¹⁶ But, if schools have reason to expect that students will

³¹¹ See Russell Korobkin, *Harnessing the Positive Power of Rankings: A Response to Posner and Sunstein*, 81 IND. L.J. 35, 40 (2006) (“[C]onsumers view educational rankings not merely as an aggregate measurement of value, but as valuable in and of themselves.”).

³¹² Morriss & Henderson, *supra* note 146, at 796.

³¹³ *Id.* at 801.

³¹⁴ Moliterno, *supra* note 170, at 1079–1080.

³¹⁵ See Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403, 409 (1998) (“‘High quality’ students . . . need a way to signal their quality to employers that cannot be imitated by ‘lower quality’ students. They do this by responding to rankings.”) (footnote omitted).

³¹⁶ *Seaton v. TripAdvisor, LLC*, No. 3:11-CV-549, 2012 WL 3637394 at *7 (E.D. Tenn. Aug. 22, 2012) (“A reasonable person would not confuse a ranking system, which uses consumer reviews

rely on rankings, then false statements to a ranking producer are statements that a school can reasonably expect will be communicated—through the prism of rankings—to a class of potential students. This would simply be the application of derivative or indirect reliance as articulated in the *Restatement*. It would allow construction of a class since virtually all members of the class are likely familiar with the ranking of particular schools they are considering.

One might ask whether recognizing FOTR serves any point if the other obstacles to a fraud claim against a law school cannot be overcome—in particular, the challenge of pleading and proving damages in the form of economic loss.³¹⁷ This concern could be answered in several ways. For one, some plaintiffs sue for injunctive relief.³¹⁸ But here I suggest the law school litigation—by seeking to ascertain a difference between the “actual” value of a law degree at a school which had allegedly committed fraud in its employment reporting—may have taken the wrong path in constructing claims for damages.

Instead, a more discrete claim of damages would be rankings-based and tied to the overwhelming practice at most law schools of tying tuition discounting—that is, scholarship assistance—to rankings-prominent statistics.³¹⁹ A student applies to a law school. If the student has the appropriate LSAT score³²⁰ and undergraduate GPA, the school offers a tuition discount to recruit them. A lower-ranked school would offer more

as its litmus, for an objective assertion of fact; [that is,] the reasonable person, in other words, knows the difference between a statement that is ‘inherently subjective’ and one that is ‘objectively verifiable.’”).

³¹⁷Mahoney, *supra* note 309, at 661 (“It should also be noted that to the extent FOTM is used outside the securities context, the danger of inaccurate damages measures becomes even more acute.”).

³¹⁸See *Harnish v. Widener Univ. Sch. of L.*, Civ. No. 12-00608 (WHW) (CLW), 2015 WL 4064647, at *2 (D.N.J. July 1, 2015). For instance, in the Temple University business school scandal class action lawsuit, a settlement included “both monetary and non-monetary terms.” *Agreement Reached in Fox School Class Action Case*, TEMPLE NOW, Dec. 21, 2018, <https://news.temple.edu/announcements/2018-12-20/agreement-reached-fox-school-class-action-case>. Among the non-monetary terms was the creation of a \$5,000 ethics scholarship “for a student with a demonstrated interest in the study of ethics in business who is enrolled in any of the programs that are part of the settlement.” *Id.*

³¹⁹Iacono, *supra* note 153, at 232 (“Law schools are purchasing higher LSAT and GPA scores to increase their position in the *US News* rankings.”).

³²⁰See TAMANAHA, *supra* note 19, at 85 (“A high LSAT score is money in the pocket for students because law schools strategically utilize scholarship awards to raise or maintain their median LSAT.”).

generous aid to the same student.³²¹ In reliance on the rankings of the schools, the student chooses the higher-ranked school in spite of higher net tuition³²² but then finds out that the higher-ranked school submitted false information to the ranking's producer. The school should have had a lower ranking; at that lower ranking, it would have had to offer the student a more generous financial aid package.³²³ The damages claim for the student would be the difference between the net tuition paid for the school as it was ranked, versus the net tuition that could have been charged by the school at its actual, non-fraudulent ranking. While it would be complicated, since many schools employ a "discounting matrix" which awards aid in a mechanical fashion based on LSAT and GPA, for any individual plaintiff it would perhaps be possible to calculate the difference in price paid compared to what should have been paid without the fraud.

Today, law schools engage in "significant tuition discounting through grants and scholarships."³²⁴ Tuition discounts have become "widespread," with estimates that only one-third of law students "pay sticker price" while the remaining two-thirds "secure a discount."³²⁵

The primary driver of differences in tuition discounts is "the 'intense competition' fostered by the *U.S. News* ranking method."³²⁶ Discounts are based on *U.S. News* metrics—"LSAT and undergraduate GPA."³²⁷ The "scholarship arms race"³²⁸ has been fueled by a "rankings-driven"³²⁹ concern

³²¹ Iacono, *supra* note 153, at 225 (noting that a move down by two positions in *U.S. News* would "force[]" a law school "to offer greater scholarships to higher GPA/LSAT performing students.").

³²² *See id.* at 227–28 ("Lower ranked schools offer greater scholarships to better qualified students.").

³²³ *See* TAMANAHA, *supra* note 19, at 80 (explaining that after an eight-spot drop in the rankings, a law school would need to offer "higher amounts" of scholarship aid "if it hopes to win students away" from more highly-ranked schools in "head-to-head competition").

³²⁴ Kyle McEntee, *More Transparency, Please*, 13 *FIU L. REV.* 465, 475 (2013).

³²⁵ Deborah Jones Merritt & Andrew Lloyd Merritt, *Agreements to Improve Student Aid: An Antitrust Perspective*, 67 *J. LEGAL EDUC.* 17, 17 (2017).

³²⁶ *Id.*

³²⁷ McEntee, *supra* note 324, at 475.

³²⁸ Klint W. Alexander, *The Law School Admissions Process: More Competitive Than Ever*, *WYO. LAW.*, June 2017, at 24.

³²⁹ George Critchlow, *Beyond Elitism: Legal Education for the Public Good*, 46 *U. TOL. L. REV.* 311, 334 (2015).

about the use of LSAT score and undergraduate GPA in the rankings, leading to “price competition in the form of discounts off sticker tuition.”³³⁰

Law schools “will negotiate price (that is, discount tuition) for accepted applicants with certain measurable characteristics, namely LSAT and [undergraduate GPA] credentials that are above the actual or aspirational median for that law school.”³³¹ Law schools allocate scholarships with concern for “which students’ scores will improve the school’s [LSAT] median.”³³² On this flip side, students selecting a law school balance “best general [r]eputation for overall quality” against the “lowest cost of attendance,” with “the scholarships and other cost discounts . . . a significant factor in many students’ decisions.”³³³

A law student with a particular LSAT score has the opportunity to attend a lower-ranked school in response to a more generous scholarship offer.³³⁴ The differences in aid across rankings levels are significant—a decision to attend a law school ranked forty spots lower may involve a difference of \$20,000–\$30,000 in increased scholarship aid per year.³³⁵

The reduced-scholarship formulation of damages differs from the “inflated tuition” argument rejected by the court in *Harnish*. In *Harnish*, the plaintiffs in effect argued that had accurate employment information been reported, the school would not have been able to charge the tuition levels it did while allegedly deceptive information was promulgated.³³⁶ The allegedly false reporting “inflated” the tuition that a school could charge to *all law students*. The reduced scholarship formulation, however, focuses on the impact of an inflated ranking on net tuition (tuition less scholarship aid) for a student *with particular entering credentials*. The reduced scholarship claim would not require a court to find that tuition levels charged by a school are linked to its employment data³³⁷—instead, it would require only a showing that the school offered particular scholarships to students with entering

³³⁰ Paul F. Campos, *The Extraordinary Rise and Sudden Decline of Law School Tuition: A Case Study of Veblen Effects in Higher Education*, 48 SETON HALL L. REV. 167, 187 (2017).

³³¹ Bernard A. Burk et al., *Competitive Coping Strategies in the American Legal Academy: An Empirical Study*, 19 NEV. L.J. 583, 594 (2018).

³³² ESPELAND & SAUDER, *supra* note 46, at 77.

³³³ Burk et al., *supra* note 331, at 593.

³³⁴ Jerome M. Organ, *Net Tuition Trends by LSAT Category From 2010 to 2014 with Thoughts on Variable Return on Investment*, 67 J. LEGAL EDUC. 51, 61 (2017).

³³⁵ *Id.* at 73.

³³⁶ 833 F.3d 298, 311 (3d Cir. 2016).

³³⁷ *Id.* at 312.

credentials, and that the school would have had to offer higher levels of aid to students with particular credentials if its ranking had been accurate rather than the product of deception. The latter would require a determination of the scholarship levels offered by schools ranked where the defendant would have ended up with accurate submission of information to the rankings producer. While this approach to damages would require calculation of damages in individual cases with reference to students' entering credentials, it might not doom class certification because the same process/formula could be applied to each member of the class.³³⁸

The reduced-scholarship approach represents an application of the “out-of-pocket” rule to damages—it “looks backward to the position the plaintiff occupied before the wrong, rather than forward to the position she hoped (or expected) to occupy after the successful completion of the transaction.”³³⁹

The end result of this approach to damages would have several implications. First, the awards would be smaller than those sought in the law school litigation—which might have included a full refund of tuition paid or lost wages from poor employment prospects. The scholarship differential would be smaller and apply only to students who received (or should have received) a scholarship offer but would perhaps still be enough to deter fraud.

Second, a scholarship-differential measure of damages would not require the use of FOTM for damages calculation,³⁴⁰ which was a difficulty some courts envisioned in the law school litigation.

Third, the schools in the bottom portion of the law school industry, where *U.S. News* provides no published rank, would not be subject to lawsuits since even if one of these committed fraud, it was not enough to lead the school to have a ranking. Students who attend an unranked school could not state a claim based on scholarships, so long as the school is unranked.³⁴¹ Limiting

³³⁸ See *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 697 (D. Minn. 1995) (“[T]he fact that the damages calculation may involve individualized analysis is not by itself sufficient to preclude certification when liability can be determined on a class-wide basis.”). Courts can employ “various judicial methods . . . to resolve individual damage issues without precluding class certification[s],” such as “appointing special masters or magistrates to preside over individual damage proceedings.” *Id.* at 698.

³³⁹ Michael B. Kelly, *The Phantom Reliance Interest in Tort Damages*, 38 SAN DIEGO L. REV. 169, 172 (2001).

³⁴⁰ See *Harnish*, 833 F.3d at 311–12.

³⁴¹ This may be an appropriate accommodation, since it appears from some empirical work that schools in the lowest reputational bands do not rely upon tuition discounting to improve entering student credentials to the degree that schools with stronger reputations do. Burk et al., *supra* note 331, at 624. Law schools “in that lower tier are not under pressure to reduce prices because they are

the potential defendants to ranked schools may overcome a concern raised in some law school lawsuits that a student who chooses to enroll in an unranked school could not claim to have reasonably relied on employment numbers, since the low ranking should itself have signaled to the student that the school's outcomes were well below those of other law schools.³⁴² Unranked schools would not be defendants, and would only be swept into cases based on a reduced-scholarship theory of damages as comparison points against a ranked school that would have been unranked if it had not committed fraud.³⁴³

VI. IN CONCLUSION: LAW SCHOOL LITIGATION'S EPITAPH

The last of the law school cases to reach its end was *Harnish v. Widener University*. After the U.S. Court of Appeals for the Third Circuit affirmed³⁴⁴ the lower court's denial of class certification,³⁴⁵ lead counsel concluded that the case was no longer economically viable and withdrew from representation of the plaintiffs.³⁴⁶ Several plaintiffs voluntarily dismissed

the only market available to the applicants who cannot get into the higher tier, and so on." Steven R. Smith, *Financing the Future of Legal Education: "Not What It Used to Be"*, 2012 MICH. ST. L. REV. 579, 599 (2012).

³⁴² See *MacDonald v. Thomas M. Cooley L. Sch.*, 880 F. Supp. 2d 785, 794 (W.D. Mich. 2012), *aff'd*, 724 F.3d 654 (6th Cir. 2013) ("[I]t is unreasonable to think that all self-employed graduates from arguably the lowest-ranked law school in the country have bustling full-time legal practices immediately upon graduation.").

[I]t . . . should have come as no surprise to these law school consumers that the most lucrative law jobs often are associated with having attended a high ranking law school. . . . [A] reasonable consumer who is seriously considering NYLS is more likely to appreciate the nexus between higher law school rankings and commensurate employment and earning expectations.

Gomez-Jimenez v. N.Y.L. Sch., 943 N.Y.S.2d 834, 845 (N.Y. Sup. Ct. 2012), *aff'd*, 956 N.Y.S.2d 54 (N.Y. App. Div. 2012)).

³⁴³ The FOTR theory is based on reliance on rankings, but schools "at the lowest level are free to ignore *US News*, helpless to alter their fate because the ranking has condemned them to the basement." TAMANAHA, *supra* note 19, at 81.

³⁴⁴ *Harnish*, 833 F.3d at 302.

³⁴⁵ See *Harnish v. Widener Univ. Sch. of L.*, Civ. No. 12-00608 (WHW) (CLW), 2015 WL 4064647, at *9 (D.N.J. July 1, 2015).

³⁴⁶ Stone & Magnanini LLP's Memorandum of Law in Support of Motion for Leave to Withdraw as Plaintiffs' Counsel at 7, *Harnish v. Widener Univ. Sch. of L.*, Civ. No. 12-00608 (WHW) (CLW), 2015 WL 4064647 (D.N.J. Nov. 9, 2017) ("Counsel has determined that it is

their claims. One was reported to have reached a settlement.³⁴⁷ The last remaining plaintiff was Gregory Edmond. Although he informed the court that he intended to end his case,³⁴⁸ he evidently failed to seek dismissal. The court adopted a report from the magistrate judge dismissing the final plaintiff's claim for failure to prosecute on September 23, 2019.³⁴⁹

The graduates, no doubt, had moved on.

So too had the legal education industry. Litigation that had captured the attention of professors and administrators at law schools around the country, as well as the bench and bar, and inspired prominent coverage in national media outlets like *The New York Times*³⁵⁰ and *The Wall Street Journal*,³⁵¹ ended with a whimper.

It may be that the lawsuits helped spur changes on the regulatory front which offer lasting benefits to future law students.³⁵² The bad publicity associated with the suits may have driven law schools—not just the defendants—to exercise more responsibility and care in terms of their data reporting to the ABA and *U.S. News*. And the law school litigation brought attention to the collective responsibility of legal educators, the bench, and bar to think on the challenges facing new lawyers. As one court put it:

If lawsuits such as this have done nothing else, they have served to focus the attention of *all* constituents on this current problem facing the legal profession—from the law schools and their regulators, to the compilers of data that rate

neither cost effective nor viable for the Firm to continue litigating this matter on an individual basis.”).

³⁴⁷Text Order, Harnish v. Widener Univ. Sch. of L., Civ. No. 12-00608 (WHW) (CLW), 2015 WL 4064647 (D.N.J. Aug. 12, 2019) (“It having been reported to the Court that the above-captioned action has been settled, with regard to plaintiff Schluth, ORDERED that this action and any pending motions are hereby administratively terminated as against plaintiff Schluth . . .”).

³⁴⁸Letter Order, Harnish v. Widener Univ. Sch. of L., Civ. No. 12-00608 (WHW) (CLW), 2015 WL 4064647 (D.N.J. Feb. 2, 2018).

³⁴⁹Order, Harnish v. Widener Univ. Sch. of L., Civ. No. 12-00608 (WHW) (CLW), 2015 WL 4064647 (D.N.J. Sept. 23, 2019).

³⁵⁰David Segal, *Is Law School a Losing Game?*, N.Y. TIMES (Jan. 8, 2011), <https://www.nytimes.com/2011/01/09/business/09law.html>.

³⁵¹Joe Palazzolo & Jennifer Smith, *Law Grads Claim Schools Misled*, WALL ST. J., (Feb. 2, 2012, 12:01 AM), <https://www.wsj.com/articles/SB10001424052970203920204577197471843581532>.

³⁵²Murray, *supra* note 117, at 104 (explaining that ABA mandated disclosures of “specific employment information may spell the end of ABA-accredited law schools reporting false or misleading employment statistics.”).

the schools to assist law school consumers, to the law firms that formerly primed the pump for a steady supply-line of associate positions to be filled by each graduating class, to the judiciary who offer clerkships to the best and the brightest, to the local bar associations whose members are responsible for the continuing health and viability of the profession, and, finally, to the prospective law students themselves. All must take a long, hard look at the current situation with the utmost seriousness of purpose.³⁵³

But the cases also left open meaningful questions about the scope of claims against educational institutions which engage in deceptive practices designed to manipulate their standing in external rankings.

³⁵³ *Gomez-Jimenez v. N.Y.L. Sch.*, 943 N.Y.S.2d 834, 855–56 (N.Y. Sup. Ct. 2012), *aff'd*, 956 N.Y.S.2d 54 (N.Y. App. Div. 2012).

FIGURE ONE: 2012–2016 LAW SCHOOL LITIGATION

Defendant	Case Name	Court(s)	Legal Claims	Dispositive or Significant Opinion(s)	Procedural Posture	Bases for Decision
Albany Law School	Austin v. Albany Law School of Union University	Supreme Court of New York, Albany County	<ul style="list-style-type: none"> Deceptive business practices and false advertising (N.Y. Gen. Bus. Law §§ 349, 350) Fraud Negligent misrepresentation 	957 N.Y.S.2d 833 (N.Y. Sup. Ct. 2013)	Motion to dismiss granted	<ul style="list-style-type: none"> No indication of literally false statement Outside sources contained accurate information
Arizona Summit Law School	Lorona v. Arizona Summit Law School, LLC	U.S. District Court, District of Arizona	<ul style="list-style-type: none"> Fraud Negligent misrepresentation 	188 F. Supp. 3d 927 (D. Ariz. 2016)	<ul style="list-style-type: none"> Partial dismissal of fraud claims granted Case subsequently appears to have settled 	<ul style="list-style-type: none"> Lack of materially false or misleading statement
Brooklyn Law School	Bevelacqua v. Brooklyn Law School	Supreme Court of New York, Kings County	<ul style="list-style-type: none"> Deceptive business practices and false advertising (N.Y. Gen. Bus. Law §§ 349, 350) Fraud Negligent misrepresentation 	2013 WL 1761504 (N.Y. Sup. Ct. Apr. 22, 2013)	Motion to dismiss granted	<ul style="list-style-type: none"> No indication of literally false statement Decision to enroll based solely on allegedly inflated employment statistics not reasonable Outside sources contained accurate information Calculation of damages would be too remote Lack of fiduciary duty
California Western School of Law DePaul University	Chaves v. California Western School of Law Phillips v. DePaul University	Superior Court of California Appellate Court of Illinois, First District, Sixth Division	<ul style="list-style-type: none"> Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1 et seq. Fraud Negligent misrepresentation 	19 N.E.3d 1019 (Ill. App. Ct. 2014)		<ul style="list-style-type: none"> Lack of fraudulent misrepresentation or concealment Lack of reasonable reliance Lack of proximate cause of damages Speculative damages
Florida Coastal School of Law	Casey v. Florida Coastal School of Law, Inc.	U.S. District Court, Middle District of Florida	<ul style="list-style-type: none"> Deceptive trade practices under Fla. Stat. §§ 501.201–213 	2015 U.S. Dist. LEXIS 176281 (M.D. Fla. 2015)	Motion to dismiss granted	<ul style="list-style-type: none"> Lack of false statement Outside sources contained accurate information
Golden Gate Law School	Auring v. Golden Gate University	Superior Court of California, San Francisco County	<ul style="list-style-type: none"> Unfair trade practices under Cal. Bus. & Prof. Code §§ 17200, 17500 Violations of Cal. Civ. Code § 1750 (CLRA) 	2012 WL 11851945 (Cal. Super Ct. July 19, 2012); 2014 WL 6634196 (Cal. Super. Ct. Aug. 11, 2014)	<ul style="list-style-type: none"> Denumer denied Motion for class certification denied Case settled according to media reports 	<ul style="list-style-type: none"> Lack of indication that representations were made to all members of class Individual issues of reliance and materiality predominate

Defendant	Case Name	Court(s)	Legal Claims	Dispositive or Significant Opinion(s)	Procedural Posture	Bases for Decision
Hofstra University	Richins v. Hofstra University	Supreme Court of New York, County of Nassau; U.S. District Court, Eastern District of New York	<ul style="list-style-type: none"> Deceptive business practices (N.Y. Gen. Bus. Law § 349) 	908 F. Supp. 2d 358 (E.D.N.Y. 2012)	<ul style="list-style-type: none"> Motion to remand to state court granted 	<ul style="list-style-type: none"> Not applicable.
Illinois Institute of Technology	Evans v. Illinois Institute of Technology	Appellate Court of Illinois, First District, Sixth Division	<ul style="list-style-type: none"> Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1 et seq. Fraud Negligent misrepresentation 	2014 Ill. App. Unpub. LEXIS 2148 (Ill. App. Ct. Sept. 26, 2014)	<ul style="list-style-type: none"> Motion to dismiss granted 	<ul style="list-style-type: none"> No affirmative misrepresentation Lack of causation of damages
John Marshall Law School	Johnson v. John Marshall Law School	Appellate Court of Illinois, First District, Sixth Division	<ul style="list-style-type: none"> Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1 et seq. Fraud Negligent misrepresentation 	2014 Ill. App. Unpub. LEXIS 2157 (Ill. App. Ct. Sept. 26, 2014)	<ul style="list-style-type: none"> Motion to dismiss granted 	<ul style="list-style-type: none"> No affirmative misrepresentation Lack of causation of damages
New York Law School	Gomez-Jimenez v. New York Law School	Supreme Court of New York, New York County; Appellate Division, New York	<ul style="list-style-type: none"> Deceptive business practices (N.Y. Gen. Bus. Law § 349) Fraud Negligent misrepresentation 	943 N.Y.S.2d 834 (N.Y. Sup. Ct. 2012), <i>aff'd</i> , 956 N.Y.S.2d 54 (N.Y. App. Div. 2012)	<ul style="list-style-type: none"> Motion to dismiss granted in full 	<ul style="list-style-type: none"> No representation that employment statistics were representative Outside sources contained accurate information Claim of damages was speculative
Southwestern Law School	Derby v. Southwestern Law School	L.A. Superior Court	<ul style="list-style-type: none"> Unfair trade practices under Cal. Bus. & Prof. Code §§ 17200, 17500 Violations of Cal. Civ. Code § 1750 (CLRA) 	BC 478133 (Cal. Super. Ct. 2014)	<ul style="list-style-type: none"> Motion for demurrer granted 	
University of San Francisco School of Law	Hallock v. University of San Francisco	Superior Court of California, San Francisco County	<ul style="list-style-type: none"> Unfair trade practices under Cal. Bus. & Prof. Code §§ 17200, 17500 Violations of Cal. Civ. Code § 1750 (CLRA) 	2014 WL 6634196 (Cal. Super. Ct. Aug. 11, 2014)	<ul style="list-style-type: none"> Motion for class certification denied 	<ul style="list-style-type: none"> Lack of indication that representations were made to all members of class Individual issues of reliance and materiality predominate

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FRAUD ON THE RANKINGS

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Defendant	Case Name	Court(s)	Legal Claims	Dispositive or Significant Opinion(s)	Procedural Posture	Bases for Decision
Thomas Cooley Law School	MacDonald v. Thomas M. Cooley Law School	U.S. District Court, Western District of Michigan	<ul style="list-style-type: none"> Michigan Consumer Protection Act, Mich. Comp. Laws § 445.901 Fraud 	880 F. Supp. 2d 785 (W.D. Mich. 2012)	<ul style="list-style-type: none"> Motion to dismiss granted 	<ul style="list-style-type: none"> Plaintiffs not consumers No objectively false statement Reliance on statistics not reasonable
Thomas Jefferson School of Law	Alaburda v. Thomas Jefferson School of Law	Superior Court of California, San Diego County	<ul style="list-style-type: none"> Negligent misrepresentation Unfair trade practices under Cal. Bus. & Prof. Code §§ 17200, 17500 Violations of Cal. Civ. Code § 1730 (CLRA) Intentional Misrepresentation Negligent Misrepresentation Negligence 	2012 WL 6039151 (Cal. Super. Ct. Nov. 29, 2012); 2013 WL 12138148 (Cal. Super. Ct. Sept. 20, 2013); 2015 WL 10634947 (Cal. Super. Ct. Dec. 28, 2015)	<ul style="list-style-type: none"> Summary judgment denied in part and granted Class certification denied Jury verdict for the defendant 	<ul style="list-style-type: none"> Claim that damages would be speculative not grounds for summary judgment Education not a "good"
Widener University School of Law	Harnish v. Widener University School of Law	U.S. Court of Appeals, Third Circuit	<ul style="list-style-type: none"> Consumer Fraud under the New Jersey Consumer Fraud Act and Delaware Consumer Fraud Act 	833 F.3d 298 (3d Cir. 2016), <i>affirming</i> 2015 WL 4064647 (D.N.J. July 1, 2015)	<ul style="list-style-type: none"> Class Certification denied 	<ul style="list-style-type: none"> Claim for damages based on Fraud on the Market Theory unsupported