
RECENT CASES

TORTS — FRAUDULENT MISREPRESENTATION — SIXTH CIRCUIT FINDS LAW SCHOOL APPLICANTS COULD NOT REASONABLY RELY ON SCHOOL-PROVIDED EMPLOYMENT STATISTICS. — *MacDonald v. Thomas M. Cooley Law School*, 724 F.3d 654 (6th Cir. 2013).

Until the recent recession, law was widely considered a safe and lucrative profession.¹ In the last few years, however, the media has raised awareness of the dim career prospects facing many law school graduates.² Some struggling graduates have filed lawsuits against their alma maters, claiming that the schools misrepresented their students' employment outcomes.³ Recently, in *MacDonald v. Thomas M. Cooley Law School*,⁴ the Sixth Circuit upheld the dismissal of a class action lawsuit accusing a law school of disseminating false employment statistics that misled the plaintiffs into attending a low-quality institution.⁵ The court treated the plaintiffs more like businesspeople who made a bad investment than like consumers who were sold a faulty product. Other courts considering similar cases have more sympathetically understood the context in which applicants receive school-supplied information and have allowed the cases to move forward. Still, even those courts did not explore the full social and psychological context that law school reform advocates blame for applicants' seemingly "unreasonable" decisionmaking.

Thomas M. Cooley Law School (Cooley), a Michigan-based institution, has the loosest admissions standards of any accredited or provisionally accredited American law school.⁶ Relying on statistics like library square footage and student body size, Cooley publishes a widely mocked law school guide, which ranks it second-best in the country.⁷

¹ See BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 136 (2012) ("Law school has traditionally been thought of as a safe harbor in a poor economy.")

² See, e.g., Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL ST. J., June 25, 2012, at A1; David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 9, 2011, at BU1.

³ See, e.g., *Alaburda v. Thomas Jefferson Sch. of Law*, No. 37-2011-00091898-CU-FR-CTL, 2012 WL 6039151 (Cal. Super. Ct. Nov. 29, 2012) (denying defendant's motion for summary judgment); *Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S.2d 834 (Sup. Ct. 2012) (granting defendants' motion to dismiss), *aff'd*, 956 N.Y.S.2d 54 (App. Div. 2012); see also Joe Palazzolo, *A Dozen Law Schools Hit with Lawsuits over Jobs Data*, WALL ST. J. L. BLOG (Feb. 1, 2012, 2:28 PM), <http://blogs.wsj.com/law/2012/02/01/a-dozen-law-schools-hit-with-lawsuits-over-jobs-data> (noting that complaints were filed against twelve schools in addition to Thomas M. Cooley Law School, Thomas Jefferson School of Law, and New York Law School).

⁴ 724 F.3d 654 (6th Cir. 2013).

⁵ See *id.* at 657–58.

⁶ *MacDonald v. Thomas M. Cooley Law Sch.*, 880 F. Supp. 2d 785, 788 (W.D. Mich. 2012).

⁷ See *id.* at 789.

But the employment prospects of its graduates are grim,⁸ even compared to the generally dire state of the legal job market.⁹ Of the twelve named plaintiffs — Cooley graduates from 2006 to 2010¹⁰ — all struggled to find legal employment, and some never did.¹¹ Several plaintiffs, for instance, could not find full-time, permanent legal employment after law school, took temporary contract assignments to make ends meet, and now own and operate their own firms¹² — which by no means ensures a stable income, especially in the early years.¹³

The plaintiffs sued Cooley in federal district court as part of a nationwide effort to hold law schools accountable for deceptive marketing practices.¹⁴ The plaintiffs' main claims — a claim under the Michigan Consumer Protection Act¹⁵ (MCPA) and a common law claim of fraudulent misrepresentation¹⁶ — focused on two statistics provided by Cooley in its “Employment Report and Salary Survey”¹⁷: first, that the “percentage of graduates employed” was seventy-six percent, and second, that the “average starting salary for all graduates” was \$54,796.¹⁸ These statistics were based on “unaudited, unverified, and self-reported” responses from about eighty-three percent of 2010 graduates.¹⁹ Cooley published these statistics on its website and also pro-

⁸ Cooley's most recent employment summary, submitted to the American Bar Association (ABA) in compliance with new regulations, *see infra* note 72, reports that only about twenty-nine percent (311 out of 1079) of its 2012 graduates had full-time, long-term employment for which bar passage was required. *See Thomas M. Cooley Law School: Employment Summary for 2012 Graduates*, ABA 1 tbl. (Mar. 30, 2013), <http://employmentsummary.abaquestionnaire.org> (generated by selecting “Thomas M. Cooley Law School” and “2012” in the dropdown menus under “Individual School Summary Reports”).

⁹ *See Law School Graduates Continue to Face Brutal Entry-Level Market*, LAW SCH. TRANSPARENCY (Apr. 1, 2013, 1:30 AM), <http://www.lawschooltransparency.com/2013/04/law-school-graduates-continue-to-face-brutal-entry-level-market> (finding that only 56.2% of 2012 graduates from ABA-approved schools were “employed in full-time, long-term lawyer jobs”).

¹⁰ *MacDonald*, 724 F.3d at 658. Thus, the plaintiffs enrolled at Cooley before the recent recession and the proliferation of commentary on law school admissions.

¹¹ *See id.* at 659.

¹² *See id.*

¹³ *See* Kyle P. McEntee & Derek M. Tokaz, *Take This Job and Count It*, 2 J.L. (1 J. LEGAL METRICS) 309, 317 (2012).

¹⁴ *See* Amended Class Action Complaint at 1, *MacDonald v. Thomas M. Cooley Law Sch.*, 880 F. Supp. 2d 785 (W.D. Mich. 2012) (No. 11-cv-00831). The Cooley plaintiffs' lawyers — David Anziska and Jesse Strauss — have filed similar suits around the country. *See* Matthew Shaer, *The Case(s) Against Law School*, NEW YORK, Mar. 12–19, 2012, at 56, 58.

¹⁵ MICH. COMP. LAWS ANN. §§ 445.901–922 (West 2011).

¹⁶ *See MacDonald*, 724 F.3d at 659–60. The plaintiffs also alleged silent fraud and negligent misrepresentation; the Sixth Circuit affirmed the district court's dismissal of both claims. *See id.* at 665–67.

¹⁷ The Sixth Circuit focused on the 2010 Employment Report, although the plaintiffs attached several others to the complaint. *See id.* at 658.

¹⁸ *MacDonald*, 880 F. Supp. 2d at 793; *see also id.* at 794–95.

¹⁹ *Id.* at 790. Plaintiffs claimed that Cooley “much later disclosed” that the salary statistic was actually “based on a scant 17.4 percent of graduates who reported any type of salary information.”

vided them to *U.S. News & World Report*, the American Bar Association (ABA), and the National Association for Law Placement (NALP).²⁰ The plaintiffs alleged that they had relied on similar statistics in deciding to attend Cooley.²¹ Emphasizing that Cooley “primarily market[ed] its product to naïve, relatively unsophisticated consumers,”²² the plaintiffs asked for \$300 million in damages to compensate them and their putative class — students enrolled at Cooley at any time since August 11, 2005.²³

The district court granted Cooley’s motion to dismiss for failure to state a claim.²⁴ First, the court dismissed the claim that Cooley violated the MCPA by engaging in “[u]nfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce.”²⁵ The court noted that, under Michigan precedent, the MCPA does not apply to goods or services “purchased primarily for business or commercial rather than personal purposes.”²⁶ Finding that “[p]laintiffs did not purchase a Cooley legal education so that they could leisurely read and understand Supreme Court Reports,” but rather “to make money as lawyers,” the court concluded that they had a business purpose and that the MCPA therefore did not protect them.²⁷

The court next dismissed the claim that the percentage-of-graduates-employed and average-starting-salary statistics amounted to fraudulent misrepresentation.²⁸ Regarding the employment statistic, the court emphasized that it was “literally true”²⁹ and “not objectively false.”³⁰ On its face, the statistic did not “differentiate between part-time, full-time, legal, or non-legal jobs.”³¹ According to the court, the plaintiffs’ “subjective misunderstanding of information that is not objectively false or misleading cannot mean that Cooley has committed the tort of fraudulent misrepresentation.”³² Turning to the salary sta-

Brief of Appellants Cross-Appellees at 50, *MacDonald*, 724 F.3d 654 (Nos. 12-2066, 12-2130). The Sixth Circuit did not address this contention.

²⁰ *MacDonald*, 880 F. Supp. 2d at 790.

²¹ *See id.*

²² Amended Class Action Complaint, *supra* note 14, at 39.

²³ *See id.* at 50, 64. The damages figure purportedly represented the difference between what the class members paid Cooley in tuition and the “true value” of a Cooley degree. *Id.* at 64.

²⁴ *MacDonald*, 880 F. Supp. 2d at 788.

²⁵ MICH. COMP. LAWS ANN. § 445.903(1) (West 2011).

²⁶ *MacDonald*, 880 F. Supp. 2d at 792 (quoting *Zine v. Chrysler Corp.*, 600 N.W.2d 384, 393 (Mich. Ct. App. 1999)).

²⁷ *Id.*

²⁸ *See id.* at 792–98.

²⁹ *Id.* at 788.

³⁰ *Id.* at 794.

³¹ *Id.*

³² *Id.* (citing *Hord v. Env'tl. Research Inst. of Mich.*, 617 N.W.2d 543, 549 (Mich. 2000) (per curiam)).

tistic, the court admitted that “the representation [was] objectively untrue” because, while it purported to measure the average starting salary of *all* graduates, it only reflected the salaries of those survey takers who revealed their salary information.³³ But Cooley’s report also noted that the statistics were based on survey results.³⁴ Given this discrepancy, the court concluded that it was unreasonable to rely on the salary statistic without inquiring further.³⁵ Thus, although “the Employment Reports are inconsistent, confusing, and inherently untrustworthy,”³⁶ the court concluded that “an ordinary prudent person would not have relied on the statistics to decide to spend \$100,000 or more.”³⁷

The Sixth Circuit affirmed.³⁸ Writing for a unanimous panel, Judge Martin³⁹ echoed the district court’s reasoning.⁴⁰ Regarding the MCPA claim, the Sixth Circuit emphasized the plaintiffs’ admission that they went to law school “to prospectively better themselves and their personal circumstances *through the attainment of full-time employment in the legal sector.*”⁴¹ Perhaps if the plaintiffs did not intend to use their education to make money, the district court might have erred in finding that they had a business purpose.⁴² But they did not attend for personal or “dilettantish” reasons — they wanted to be employed as lawyers.⁴³ Therefore, the court did not distinguish the plaintiffs from, for instance, a purchaser of a truck for an existing business,⁴⁴ or a buyer of electricity for use at a hog-production facility.⁴⁵

The Sixth Circuit also endorsed the district court’s reasoning with respect to the fraudulent misrepresentation claim. The employment statistic could not support the claim because a purported misrepresentation must be false and the plaintiffs could not “prove that this statistic was false.”⁴⁶ Moreover, their reliance was unreasonable because the statistic itself informed the applicant that it did not include only

³³ *Id.*; *see id.* at 794–95.

³⁴ *Id.* at 789.

³⁵ *See id.* at 796–97.

³⁶ *Id.* at 796.

³⁷ *Id.* at 797.

³⁸ *MacDonald*, 724 F.3d at 657.

³⁹ Judge Martin was joined by Judge Cook as well as by Judge Graham of the Southern District of Ohio, sitting by designation.

⁴⁰ The Sixth Circuit agreed with the district court’s rejection of two of Cooley’s arguments in its cross-appeal and did not reach the third because the plaintiffs’ claim was dismissed on other grounds. *See MacDonald*, 724 F.3d at 667.

⁴¹ *Id.* at 661 (quoting Amended Class Action Complaint, *supra* note 14, at 54 (emphasis added)) (internal quotation marks omitted).

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *See id.* (citing *Zine v. Chrysler Corp.*, 600 N.W.2d 384 (Mich. Ct. App. 1999)).

⁴⁵ *See id.* (citing *Jackson Cnty. Hog Producers v. Consumers Power Co.*, 592 N.W.2d 112 (Mich. Ct. App. 1999) (per curiam)).

⁴⁶ *Id.* at 663.

full-time legal jobs.⁴⁷ The salary statistic also could not support the misrepresentation claim because, despite its “untruth” in claiming to represent an average of all graduates’ salaries, the plaintiffs’ reliance was unreasonable in light of the fact that the same report noted that the statistics came from a survey.⁴⁸

The Sixth Circuit’s opinion exhibits judicial reluctance to see the law school admissions process as critically — and applicants as sympathetically — as do advocates of law school reform. The complaint encapsulates the reform view in a sentence: “Thomas Cooley is primarily marketing its product to *naïve, relatively unsophisticated consumers* — many of whom are barely removed from college — who are often making their first ‘big-ticket’ purchase based on asymmetrical information.”⁴⁹ This portrayal is consistent with reformers’ argument that everyday cognitive biases — and a loan system that encourages attendance no matter the cost — lead applicants to naïvely assume the best about the information they receive from prospective law schools. This consumer psychology explains applicants’ seeming lack of diligence and “reasonableness.” The Sixth Circuit, however, treated the plaintiffs more like foolhardy businesspeople than naïve consumers. Even other, more plaintiff-friendly courts, which took steps toward considering the context in which applicants receive information from schools, did not explore the full social and psychological context of law school decisionmaking as understood by reformers.

Instead of treating the plaintiffs like “naïve, relatively unsophisticated consumers” who were misled into purchasing a faulty product, the Sixth Circuit treated them like businesspeople who made bad business choices. This approach is demonstrated most clearly by the decision to apply the MCPA’s business-purpose exception. Noting that the plaintiffs did not attend law school “for dilettantish reasons,”⁵⁰ the court suggested that their level of care was not commensurate with their career ambitions. They were not consumers of education, but investors in a business opportunity.⁵¹ Moreover, the plaintiffs’ attempt to draw a line between established businesspeople and recent college graduates was unavailing; the court did not address the plaintiffs’ argument that Michigan’s business-purpose precedents all concerned

⁴⁷ *See id.*

⁴⁸ *Id.* at 665.

⁴⁹ Amended Class Action Complaint, *supra* note 14, at 39 (emphasis added).

⁵⁰ *MacDonald*, 724 F.3d at 661.

⁵¹ For a contrasting approach, see *Alaburda v. Thomas Jefferson School of Law*, No. 37-2011-00091898-CU-FR-CTL, slip op. at 3 (Cal. Super. Ct. Nov. 29, 2012), available at 2012 WL 6039151, which found that within the meaning of the California Consumers Legal Remedies Act, plaintiffs were not investors in an education, as defendants argued, but consumers of services.

purchases made for an existing business, which the plaintiffs obviously lacked.⁵²

The court's treatment of plaintiffs as imprudent businesspeople carried over to its analysis of the fraudulent misrepresentation claim. The court cited cases involving established businesspeople in traditional business contexts without noting how the plaintiffs might have been differently situated. For instance, for the proposition that "[a] plaintiff's subjective misunderstanding of information that is not objectively false or misleading cannot mean that a defendant has committed the tort of fraudulent misrepresentation,"⁵³ the court cited a Michigan Supreme Court case in which the plaintiff claimed to be "one of the foremost authorities in the United States on high speed parallel computing."⁵⁴ Similarly, finding the plaintiffs' reliance on Cooley's employment and salary statistics unreasonable, the court compared them to an insurance sales agent who unreasonably relied on oral statements that were contradicted by a written contract.⁵⁵ A more flexible, context-dependent application of the reasonableness standard would have allowed a distinction between established businesspeople, like the computing expert, and "naïve, relatively unsophisticated" law school applicants.

Other courts have more sympathetically understood the context in which law school applicants consider school-supplied information. In two parallel cases, a California trial court overruled demurrers arguing that the plaintiffs could not have reasonably relied on the law schools' employment statistics.⁵⁶ The court reasoned that the law schools' statements regarding their graduates' employment rates "were allegedly made in a context (i.e. in materials designed to attract and retain law students to defendant's law school) where a reasonable prospective or current law student could reasonably believe that the statements pertained only to jobs for which a law school education is a requirement or preference."⁵⁷ In these two cases, the court seemed to evaluate the applicants' decisions in light of the fact that they were reading promotional materials and were meant to come to positive conclusions about the schools.

⁵² See Brief of Appellants Cross-Appellees, *supra* note 19, at 28–32.

⁵³ *MacDonald*, 724 F.3d at 663 (alteration in original) (quoting *Hord v. Envtl. Research Inst. of Mich.*, 617 N.W.2d 543, 549 (Mich. 2000) (per curiam)) (internal quotation marks omitted).

⁵⁴ Plaintiff-Appellee's Brief on Appeal at 1, *Hord*, 617 N.W.2d 543 (No. 200481).

⁵⁵ See *MacDonald*, 724 F.3d at 664–65 (citing *Novak v. Nationwide Mut. Ins. Co.*, 599 N.W.2d 546 (Mich. Ct. App. 1999)).

⁵⁶ See *Arring v. Golden Gate Univ.*, No. CGC-12-517837 (Cal. Super. Ct. July 19, 2012); *Hallock v. Univ. of S.F.*, No. CGC-12-517861 (Cal. Super. Ct. July 19, 2012).

⁵⁷ *Arring*, No. CGC-12-517837, slip op. at 2; *Hallock*, No. CGC-12-517861, slip op. at 2.

In a similar case, a federal district court in New Jersey — denying defendant Widener University School of Law’s motion to dismiss — expounded on the context of law school admissions:

[The] function [of Widener’s website] is to persuade a prospective law student to attend Widener in order to receive a degree in law. . . . Within this context, it is not implausible that a prospective law student making the choice of whether or which law school to attend, would believe that the employment rate referred to law related employment.⁵⁸

While the New Jersey court dealt with a very different statute than the MCPA,⁵⁹ its interpretation of the decisionmaking context was clearly more charitable toward the plaintiffs than the Sixth Circuit’s was. Both the New Jersey and California courts emphasized that the plaintiffs were prospective students reading school-supplied promotional materials, not businesspeople considering a business investment.⁶⁰

Still, despite their sympathy and favorable rulings, the California and New Jersey courts did not explore the full context of law school decisionmaking as understood by reform advocates. While law school reformers do emphasize the quality of the information provided to applicants⁶¹ and the fact that this information is received in the form of promotional materials,⁶² they also more critically evaluate the broader social and psychological context in which information is disseminated and interpreted. For instance, Professor Paul Campos criticizes “Special Snowflake Syndrome”⁶³: the idea that statistical facts do not apply because “I am not a statistic.”⁶⁴ Campos traces this syndrome to a pair of everyday cognitive biases: optimism bias and confirmation bias. Optimism bias describes the belief that one’s chances at success are better than average and that a catastrophic outcome is unlikely.⁶⁵ Confirmation bias is the tendency to pay attention to information that supports what one already believes or wants to believe.⁶⁶ Confronted

⁵⁸ *Harnish v. Widener Univ. Sch. of Law*, 931 F. Supp. 2d 641, 650 (D.N.J. 2013) (citing *Hallock*, No. CGC-12-517861, slip op. at 2).

⁵⁹ The New Jersey Consumer Fraud Act “does not distinguish between personal and business purposes,” *id.*, and does not require proof of reliance, *see id.* at 651.

⁶⁰ The two California cases and the New Jersey case are currently in discovery. *See* Karen Sloan, *Court Nixes Fraud Claims Against Cooley Law School*, NAT’L L.J. (July 31, 2013), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202613113611>.

⁶¹ *See, e.g.*, Kyle P. McEntee & Patrick J. Lynch, *A Way Forward: Transparency at American Law Schools*, 32 PACE L. REV. 1, 5 (2012) (“Prospectives . . . lack the information they need to make a meaningful decision about whether and where to earn a J.D.”).

⁶² *See id.* at 7 (“[L]aw schools are sophisticated suppliers that advertise their services to unsophisticated consumers who lack substantial bargaining power.”).

⁶³ PAUL CAMPOS, DON’T GO TO LAW SCHOOL (UNLESS) 16 (2012).

⁶⁴ *Id.* at 17.

⁶⁵ *See id.* at 18; *see also* TAMANAHA, *supra* note 1, at 143–44 (noting that law students are prone to optimism bias).

⁶⁶ *See* CAMPOS, *supra* note 63, at 19.

with grim employment figures like Cooley's seventy-six percent employment rate, confirmation bias inclines applicants to believe that this figure must reflect full-time legal employment, while optimism bias inclines them to believe that, statistics aside, they will be successful. The law school admissions process may especially promote these biases because of the "culturally embedded view that law school is a 'magic ticket' to financial security."⁶⁷

Another factor in applicants' decisionmaking is the willingness of lenders — most notably the federal government⁶⁸ — to advance law students the full cost of attendance.⁶⁹ The ready availability of student loans totaling hundreds of thousands of dollars signals that law school is a good investment.⁷⁰ By contrast, a "risk-based pricing framework" that differentiated borrowers according to their prospective employment outcomes⁷¹ would discourage borrowing huge sums to attend schools like Cooley. The loan system, according to reformers, thus provides further context for understanding the decision to attend low-ranked schools.

The legal battle against law schools may turn, in part, on an even more basic consideration: whether the courts treat the plaintiffs as naïve, easily manipulated consumers, or as businesspeople making a significant investment who should bear the consequences of their bad decisions. Even the California and New Jersey courts did not consider the broader social and psychological context as reformers see it — understandably, for doing so could raise difficult questions about the very concept of "reasonableness." It may be that arguments about cognitive bias and a broken risk-signaling process are more persuasive as reasons for changing the regulatory environment, as the ABA has started to do,⁷² than as reasons for finding schools retrospectively liable for their marketing practices.

⁶⁷ McEntee & Lynch, *supra* note 61, at 5; *see also* TAMANAHA, *supra* note 1, at 144 (stating that "few law students" are "completely irrational," as opposed to "foolishly optimistic").

⁶⁸ Federally supported loans dominate the student loan market, accounting for roughly eighty-six percent of loans outstanding as of June 2012. Note, *Ending Student Loan Exceptionalism: The Case for Risk-Based Pricing and Dischargeability*, 126 HARV. L. REV. 587, 590 (2012).

⁶⁹ *See* McEntee & Lynch, *supra* note 61, at 5 ("The market for law degrees has been distorted by easy financing . . .").

⁷⁰ *See* Note, *supra* note 68, at 598 ("[B]y not providing a reliable signal of the riskiness of the debt that certain borrowers are assuming, the federal government is leading them to take on too much of it for too little educational value.").

⁷¹ *See id.*

⁷² *See* 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, 781–83 (2013) (describing the ABA's recent reforms, including requiring schools to differentiate between full-time legal jobs and other employment, but noting that the ABA does not yet require disclosure of salary data or independent audits of employment data).