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*Is Applying a Reasonable Person Standard in the Law School Misrepresentation Cases  
Unreasonable?*

by  
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Submitted in partial fulfillment of the requirements of the  
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Michigan State University College of Law  
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## Introduction

When children are in grade school and give their reports on what they want to be when they grow up, many will say they want to be a lawyer or a doctor, a professional baseball player or a ballerina, some children even want to grow up to be a superhero. However, no child would say she wants to grow up and be unemployed, look for months on end, and be able to find no suitable employment. This is the unfortunate reality for a large portion of law school graduates, but this is not always clear from looking at various sources that present law school graduate's employment statistics. For decades, getting a professional degree was a good investment. I was even encouraged as a child to go to law school because it was a sure way to make a great living. Lawyers are believed, by many on the outside looking in, to have it all, to be prestigious, well respected, and rich. Unfortunately, the days of a law degree leading to great riches for all who manage to graduate is behind us. The idea that a law degree will open countless doors and a whole world of opportunities is no longer true, and, if the courts have it their way, law schools will no longer be prestigious institutions, but rather traps for the unaware or unrealistic. Law schools are becoming known, and will continue to be known, as money making enterprises whose main concern is whether they can be less efficient in order to rise in the U.S. News and World Report's (U.S. News) rankings.

In this article, I will argue that a better standard in the law school misrepresentation cases is a standard the Supreme Court adopted for fraud and misrepresentation in bankruptcy proceedings, which is known as justified reliance. In part I, I will present some background information on various law schools' misreporting, including a discussion of several of the recent lawsuits against various law schools. Next, in part II, I will discuss the reasonable person standard. In particular, I will present background information on the reasonable person standard,

who is a reasonable law school applicant, why the courts in the law school misrepresentation cases should depart from a reasonable person standard, and explain why the courts in the cases that were dismissed got it wrong. Finally, in part III, I will present a better standard in law school misrepresentation cases, the justified reliance standard.

## **I. Background Information on Law School's Misreporting**

### **a. Law School Reporting**

In the year 2013, it seems obvious to most people in the legal world that law jobs are disappearing and the \$160,000 per year big firm jobs are few and far between, particularly if you are not graduating from Harvard or Yale. However, not every law school applicant is familiar with what is now seen as common practice in law school reporting. According to Brian Tamanaha,<sup>1</sup> Law schools “use[] a variety of fudges to jimmy [employment statistics] up” such as: graduates were included as employed if they had any kind of job; those employed not in the legal field, for example as a waitress, “would be identified as ‘employed’ in ‘business and industry’;” graduates who had stopped seeking employment or were pursuing further education were left out entirely; and law schools would hire their own unemployed graduates for a few weeks over the reporting period. Also, U.S. News had treated graduates “whose status was ‘unknown’ as employed,”<sup>2</sup> in the past, but has since changed this practice.

The problem with these ‘fudges’ is that unsophisticated law school applicants had no real way of knowing what their employment prospects might be. Some of the primary sources law applicants use to determine employment statistics are the law schools themselves, the American

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<sup>1</sup> BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 71-72 (The University of Chicago Press 2012).

<sup>2</sup> *Id.*

Bar Association (ABA), the National Association for Law Placement (NALP), and U.S. News.<sup>3</sup> The two most commonly used sources of employment rates post law school are U.S. News and NALP.<sup>4</sup> However, up until 2011, U.S. News' method was flawed because it included in its employed statistic people who were unemployed, but were no longer seeking employment.<sup>5</sup> Likewise, the NALP employment statistics has a huge flaw in that the statistics only report employment statistics for all law schools together, as a whole.<sup>6</sup> This has changed because the ABA now requires law schools to publicly disclose employment statistics on their websites.<sup>7</sup> Now the law schools have this information on their websites, but that is little relief to the plaintiffs in law suits against their former law schools who entered law school prior to this new standard and relied on the misleading statistics. Even now, with the new ABA standard, there are still problems in reporting based on problems such as whether a graduate is employed full-time or part-time, as discussed below. The numbers, even now, are misleading and unclear. Also, schools still use these "fudges" to their benefit, instead of disclosing the truth, which is that they do not know whether employment for some graduates is full-time or part-time.<sup>8</sup> The law schools are not only "allowed" to get away with this misleading practice, but are in fact required by the ABA to do this.<sup>9</sup>

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<sup>3</sup> Ben Trachtenberg, *Law School Marketing and Legal Ethics*, NEB. L. REV. (forthcoming June 2013) available at <http://ssrn.com/abstract=2192694>.

<sup>4</sup> Campos, *Served*, THE NEW REPUBLIC (Apr. 25, 2011), <http://www.newrepublic.com/article/87251/law-school-employment-harvard-yale-georgetown#>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 509.

<sup>8</sup> Trachtenberg, *supra* note 3 (quoting *Class of 2011 Employment Statistics*, T.M. COOLEY SCH. L. (Mar. 30, 2012), [http://www.cooley.edu/consumerinformation/\\_docs/2011\\_Graduate\\_Employment\\_Report.pdf](http://www.cooley.edu/consumerinformation/_docs/2011_Graduate_Employment_Report.pdf)).

<sup>9</sup> *Id.*

## b. Recent Court Cases

In the recent case against Thomas M. Cooley Law School (hereinafter Cooley), twelve graduates, on behalf of themselves and all others similarly situated, filed suit against Cooley with the allegations that “Cooley deceived, defrauded, and misled them regarding Cooley graduates’ employment prospects, which caused Plaintiffs to pay more to attend law school than they would have paid if Plaintiffs had known the true prospects of their employment.”<sup>10</sup> The plaintiff’s complaint claimed Cooley violated Michigan’s Consumer Protection Act (MCPA) M.C.L. § 445.901, *et seq.* (Count I); committed fraud (Count II); and committed negligent representation (Count III).<sup>11</sup> Plaintiffs’ claims stem from an “Employment Report and Salary Survey (Employment Reports),” which Cooley provided to both prospective and current students.<sup>12</sup> Plaintiffs claim that “Cooley ‘blatantly misrepresent[s] and manipulate[s] its employment statistics’ in these Employment Reports.”<sup>13</sup>

In this case, the court ultimately granted Cooley’s motion to dismiss the case.<sup>14</sup> The court determined that the MCPA did not apply to purchasing a legal education.<sup>15</sup> Thus, Count I is not a claim for which the court can grant relief.<sup>16</sup> The MCPA does not apply “[i]f an item is purchased primarily for business or commercial rather than personal purposes.”<sup>17</sup> The court reasoned that the purpose in pursuing a law degree is primarily for business purposes, so the MCPA does not

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<sup>10</sup> MacDonal v. Thomas M. Cooley Law Sch., 880 F.Supp.2d 785, 788 (W.D. Mich. 2012).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 789.

<sup>13</sup> *Id.*

<sup>14</sup> FED. R. CIV. P. 12(b)(6); *Cooley*, 880 F.Supp.2d at 788.

<sup>15</sup> Chelsea Phipps, *Cooley Law Grads’ Lawsuit Dismissed*, WALL ST. J. LAW BLOG, July 20, 2012, <http://blogs.wsj.com/law/2012/07/20/cooley-law-grads%E2%80%99-lawsuit-dismissed/>.

<sup>16</sup> *Cooley*, 880 F.Supp.2d at 788.

<sup>17</sup> *Id.* at 792.

apply.<sup>18</sup> The remaining counts were “dismissed because one representation is literally true,”<sup>19</sup> and because the court found the Plaintiffs unreasonably relied upon Cooley’s representations.<sup>20</sup>

Cooley Law School consistently ranks in the bottom tier in every law school ranking.<sup>21</sup> Cooley is the largest law school in the country, with approximately 4,000 students.<sup>22</sup> Cooley also has lower admission standards than any other law school in the country.<sup>23</sup> Furthermore, Cooley has developed and publishes “its own law school rankings, which have been met with ‘great skepticism, if not outright ridicule, and no reputable academic or legal commentator takes it serious.’”<sup>24</sup> These rankings are still published by Cooley.<sup>25</sup>

The Plaintiffs’ stated desire is to bring about a “transparency to the way law schools report post-graduate employment data and salary information, by requiring that they make critical, material disclosures that will give both prospective and current students a more accurate picture of their post-graduate financial situation.”<sup>26</sup> The Plaintiffs are acting on their own behalf, as well as for anyone who graduated from Cooley or attended Cooley from August 2005 until now.<sup>27</sup> The common allegations of the twelve named Plaintiffs

are that each Plaintiff ‘did not enroll in Thomas Cooley with the intention of using his [or her] JD degree for an ongoing business or to start a non-legal business, but rather intended to use [the] JD degree to prospectively

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 788.

<sup>20</sup> Debra Cassens Weiss, *In Buyer Beware Decision, Judge Tosses Grads’ Suit Against Cooley Law School*, A.B.A. J., July 23, 2012, available at [http://www.abajournal.com/news/article/in\\_buyer\\_beware\\_decision\\_judge\\_tosses\\_grads\\_suit\\_against\\_cooley\\_law\\_school/](http://www.abajournal.com/news/article/in_buyer_beware_decision_judge_tosses_grads_suit_against_cooley_law_school/).

<sup>21</sup> Cooley, 880 F.Supp.2d at 788.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 789.

<sup>25</sup> JUDGING THE LAW SCHOOLS, available at [http://www.cooley.edu/rankings/\\_docs/Judging\\_12th\\_Ed\\_2010.pdf](http://www.cooley.edu/rankings/_docs/Judging_12th_Ed_2010.pdf).

<sup>26</sup> Cooley, 880 F.Supp.2d at 790.

<sup>27</sup> *Id.*

better himself [or herself] and his [or her] personal circumstances through the attainment of full-time employment in the legal sector. In applying and deciding to remain enrolled at Thomas Cooley, [each Plaintiff] relied on salary data and employment information posted on [Cooley's] website, marketing material and/or disseminated to third-party data clearinghouses and publications, such as the ABA and U.S. News.<sup>28</sup>

Furthermore, the Plaintiffs “specifically relied upon Cooley's ‘representations that, depending on the year, approximately 80 percent of its graduates were employed within nine months of graduation and earned a median salary of roughly \$50,000.’”<sup>29</sup> The plaintiffs claim that Cooley misled them in regards to each plaintiff’s employment prospects.<sup>30</sup> The Plaintiffs each claim that if they had known that the Employment Reports included both short-term and part-time employment and employment that did not require, or at least prefer, a JD, then they would not have paid as much to attend Cooley or they may have chosen to go to a different school.<sup>31</sup> The Plaintiffs go on to allege that Cooley’s misrepresentations resulted in the Plaintiffs taking on large levels of debt to attend Cooley.<sup>32</sup>

The court determined the Plaintiffs reliance on the Employment Reports was unreasonable.<sup>33</sup> First, the court determined the Plaintiffs were unreasonable because they had a subjective misunderstanding. The Plaintiffs’ subjective misunderstanding of the Employment

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Debra Cassens Weiss, *In Buyer Beware Decision, Judge Tosses Grads’ Suit Against Cooley Law School*, A.B.A. J., July 23, 2012, available at [http://www.abajournal.com/news/article/in\\_buyer\\_beware\\_decision\\_judge\\_tosses\\_grads\\_suit\\_against\\_cooley\\_law\\_school/](http://www.abajournal.com/news/article/in_buyer_beware_decision_judge_tosses_grads_suit_against_cooley_law_school/).

<sup>31</sup> Cooley, 880 F.Supp.2d at 790.

<sup>32</sup> *Id.* at 791.

<sup>33</sup> Chelsea Phipps, *Cooley Law Grads’ Lawsuit Dismissed*, WALL ST. J. LAW BLOG, July 20, 2012, <http://blogs.wsj.com/law/2012/07/20/cooley-law-grads%E2%80%99-lawsuit-dismissed/>.

Reports, which was neither objectively false nor misleading, is insufficient to sustain a claim against Cooley for fraudulent misrepresentation.<sup>34</sup>

Next, the court determined it was unreasonable in several ways for the Plaintiffs to rely on the “percentage of graduates employed” statistic to consist of only graduates who were working in full time legal positions, and not in other types of positions.<sup>35</sup> First, this is unreasonable because the statistic does not differentiate between legal or non-legal positions and full-time or part-time positions.<sup>36</sup> Next, the Employment Reports stated that “many Cooley graduates were ‘self employed’ solo practitioners; it 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.”<sup>37</sup> Lastly, the court claims that “basic deductive reasoning,” would allow a reasonable person to conclude that the Employment Reports must include some non-legal or part-time positions because the Employment Reports include all employed graduates.<sup>38</sup> The students “unreasonably deduced” that the Employment Reports did not include all employed graduates.<sup>39</sup>

The court also found Plaintiffs’ reliance on the “average starting salary” statistic unreasonable; they “either knew or could have readily discovered every material fact that was known by the defendants [].”<sup>40</sup> The reasoning is that Plaintiffs knew, according to the

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<sup>34</sup> Cooley, 880 F.Supp.2d at 794 (*quoting* Hord v. Env'tl. Research Inst. of Mich., 463 Mich. 399, 617 N.W.2d 543 (2000)).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Debra Cassens Weiss, *In Buyer Beware Decision, Judge Tosses Grads' Suit Against Cooley Law School*, A.B.A. J., July 23, 2012, available at [http://www.abajournal.com/news/article/in\\_buyer\\_beware\\_decision\\_judge\\_tosses\\_grads\\_suit\\_against\\_cooley\\_law\\_school/](http://www.abajournal.com/news/article/in_buyer_beware_decision_judge_tosses_grads_suit_against_cooley_law_school/).

<sup>40</sup> Cooley, 880 F.Supp.2d at 795 (*quoting* Aron Alan, LLC v. Tanfran, Inc., 240 Fed.Appx.678, 682 (6th Cir. 2007)).

Employment Reports themselves, that Cooley did not know all of their graduates starting salary information.<sup>41</sup> Therefore, the reliance on the “average starting salary” statistic is unreasonable. The court goes on to point out that “Plaintiffs had no way to determine the number or amount of graduates’ salaries used to determine the average starting salary.”<sup>42</sup> This is important because the Plaintiffs allege that Cooley left out the salaries of self employed students who responded to the survey and stated their starting salary was zero.<sup>43</sup>

Another recent court case that was dismissed was the case against New York Law School (Hereinafter NYLS).<sup>44</sup> The court in this action affirmed the motion to dismiss from the lower court.<sup>45</sup> The Plaintiffs in this class action are graduates of NYLS who attended between the years 2004 and 2011.<sup>46</sup> The claims in this case include “a claim for deceptive acts and practices in violation of General Business Law (GBL) § 349 and claims for common-law fraud and negligent misrepresentation.”<sup>47</sup> The plaintiffs claim, like in *Cooley*, that NYLS misled them about job prospects once the plaintiffs graduated.<sup>48</sup> These claims,

are based on allegations that the employment and salary information published by defendant during the relevant time period concealed, or failed to disclose, that the employment data included temporary and part-time positions and that the reported mean salaries were calculated based on the salary information submitted by a deliberately small selected subset of graduates. In addition, plaintiffs allege that defendant enhanced its

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<sup>41</sup> *Id.* at 796.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 795.

<sup>44</sup> *Gomez-Jimenez v. New York Law Sch.*, 103 A.D.3d 13, 956 N.Y.S.2d 54 (2012) leave to appeal denied, 2013-190, 2013 WL 1235500 (N.Y. Mar. 28, 2013).

<sup>45</sup> *Id.* at 14.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 14-15.

<sup>48</sup> Brendan Pierson, *NYLS Wins Dismissal of Class Action Over Job Figures*, N.Y.L.J., Dec. 21, 2012, available at [http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202582259980&NYLS\\_Wins\\_Dismissal\\_of\\_Class\\_Action\\_Over\\_Job\\_Figures&slreturn=20130406202406](http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202582259980&NYLS_Wins_Dismissal_of_Class_Action_Over_Job_Figures&slreturn=20130406202406).

numbers by, among other things, hiring unemployed graduates as short-term research assistants so that they could be classified as employed.<sup>49</sup>

NYLS moved to dismiss the case and argued three primary reasons why the employment reports were not materially misleading.<sup>50</sup> First, NYLS argued that the “employment reports were not materially misleading because they [] complied with the then applicable disclosure rules of the American Bar Association (ABA).”<sup>51</sup> Second, NYLS “made no representation or implication that they included only full-time, permanent employment that required or preferred a law degree.”<sup>52</sup> Third, NYLS “explicitly revealed that the reported salary ranges were based on a small sample of graduates.”<sup>53</sup> Ultimately, the court affirmed the lower court’s decision to dismiss the case on NYLS’s motion.<sup>54</sup> The Plaintiffs in this case sought for leave to appeal to New York’s highest court, but leave for appeal was denied.<sup>55</sup>

In considering the Plaintiffs’ GBL 349 claim, the court laid out the applicable standard for “[w]hether a representation or omission is a ‘deceptive act or practice’ depends on the likelihood that it will ‘mislead a reasonable consumer acting reasonably under the circumstances.’”<sup>56</sup> The court determined that

although there is no question that the type of employment information published by defendant (and other law schools) during the relevant period likely left some consumers with an incomplete, if not false, impression of the schools’ job placement success, Supreme Court correctly held that this statistical gamesmanship, which the ABA has since repudiated in its

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<sup>49</sup> *Gomez-Jimenez*, 103 A.D.3d at 15.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Brendan Pierson, *NYLS Wins Dismissal of Class Action Over Job Figures*, N.Y.L.J., Dec. 21, 2012, available at [http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202582259980&NYLS\\_Wins\\_Dismissal\\_of\\_Class\\_Action\\_Over\\_Job\\_Figures&slreturn=20130406202406](http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202582259980&NYLS_Wins_Dismissal_of_Class_Action_Over_Job_Figures&slreturn=20130406202406).

<sup>55</sup> *Gomez-Jimenez v. New York Law Sch.*, 2013-190, 2013 WL 1235500 (N.Y. Mar. 28, 2013).

<sup>56</sup> *Gomez-Jimenez*, 103 A.D.3d at 16.

revised disclosure guidelines, does not give rise to a cognizable claim under GBL 349.<sup>57</sup>

The court did mention its concern about NYLS's disclosures, which were incomplete and not completely honest, but this alone is not enough to conclude NYLS violated GBL 349. NYLS simply published technically truthful information and allowed prospective students to make their own conclusions about the information.<sup>58</sup> The court then found that NYLS's "disclosures were not materially deceptive or misleading."<sup>59</sup> However, NYLS, since this case, has made public the information that the school reports to the ABA and U.S. News.<sup>60</sup>

The court then goes on to consider the plaintiffs' claims for fraud and negligent misrepresentation.<sup>61</sup> In order for a plaintiff to properly state a claim for fraudulent misrepresentation, she "must allege a misrepresentation or a material omission of fact" that is "false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury."<sup>62</sup> A fraudulent concealment cause of action, "in addition to the four foregoing elements, [must also include] an allegation that the defendant had a duty to disclose material information and that it failed to do so."<sup>63</sup> Furthermore,

[t]o state a cause of action for negligent misrepresentation, in turn, the plaintiff must allege (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct

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<sup>57</sup> *Id.* at 17.

<sup>58</sup> *Id.* (internal citations omitted).

<sup>59</sup> *Id.*

<sup>60</sup> Brendan Pierson, *NYLS Wins Dismissal of Class Action Over Job Figures*, N.Y.L.J., Dec. 21, 2012, available at [http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202582259980&NYLS\\_Wins\\_Dismissal\\_of\\_Class\\_Action\\_Over\\_Job\\_Figures&slreturn=20130406202406](http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202582259980&NYLS_Wins_Dismissal_of_Class_Action_Over_Job_Figures&slreturn=20130406202406).

<sup>61</sup> *Gomez-Jimenez*, 103 A.D.3d at 17.

<sup>62</sup> *Id.* at 17-18 (internal citations omitted).

<sup>63</sup> *Id.* at 18 (internal citations omitted).

information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information.<sup>64</sup>

The Plaintiffs claim that NYLS “knowingly published misrepresentations about its graduates’ employment rates and salaries, and fraudulently concealed the fact that the employment rates included temporary, part-time, voluntary or non-JD-required/preferred employment.”<sup>65</sup> The judge stated that the employment and salary statistics provided by NYLS was not false, even if they were incomplete.<sup>66</sup> The court goes on to say that there was no fiduciary obligation between NYLS and the plaintiffs that required a full and complete disclosure from NYLS to its prospective students.<sup>67</sup> Therefore, the court dismissed plaintiff’s claim “to the extent that it is based on fraudulent concealment and negligent misrepresentation.”<sup>68</sup>

The court then goes on to express its sympathy to the plaintiffs and their concerns. The court acknowledges that prospective law students may be vulnerable to misrepresentations made by law schools.<sup>69</sup> The court did not agree with the lower court, which stated that prospective law students are sophisticated when it comes to making decisions about their future.<sup>70</sup> The court also states that college graduates “sometimes make decisions to yoke themselves and their spouses [] to a crushing burden because the schools have made misleading representations that give the impression that a full time job is easily obtainable when in fact it is not.”<sup>71</sup> The court then goes on to say that

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<sup>64</sup> *Id.* (internal citations omitted).

<sup>65</sup> *Id.* (internal citations omitted).

<sup>66</sup> Brendan Pierson, *NYLS Wins Dismissal of Class Action Over Job Figures*, N.Y.L.J., Dec. 21, 2012, available at [http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202582259980&NYLS\\_Wins\\_Dismissal\\_of\\_Class\\_Action\\_Over\\_Job\\_Figures&slreturn=20130406202406](http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202582259980&NYLS_Wins_Dismissal_of_Class_Action_Over_Job_Figures&slreturn=20130406202406).

<sup>67</sup> *Gomez-Jimenez*, 103 A.D.3d at 18-19.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 19.

<sup>70</sup> Pierson, *supra* note 48.

<sup>71</sup> *Gomez-Jimenez*, 103 A.D.3d at 19.

Given this reality, it is important to remember that the practice of law is a noble profession that takes pride in its high ethical standards. Indeed, in order to join and continue to enjoy the privilege of being an active member of the legal profession, every prospective and active member of the profession is called upon to demonstrate candor and honesty. This requirement is not a trivial one. For the profession to continue to ensure that its members remain candid and honest public servants, all segments of the profession must work in concert to instill the importance of those values. ‘In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them.’ Defendant and its peers owe prospective students more than just barebones compliance with their legal obligations. Defendant and its peers are educational not-for-profit institutions. They should be dedicated to advancing the public welfare. In that vein, defendant and its peers have at least an ethical obligation of absolute candor to their prospective students.<sup>72</sup>

The court clearly wants to see law schools change, but is unable to do anything more than state the court’s desire for law schools to be more open and honest with their prospective students as a potential remedy.<sup>73</sup>

One final case that was dismissed and is important to consider is the DePaul University case.<sup>74</sup> This case was filed by nine plaintiffs who were students at DePaul University College of Law between 2003 and 2008.<sup>75</sup> Each plaintiff claims to have large student loans they must repay, and they have not yet found legal jobs that would enable them to repay the debt they each owe.<sup>76</sup> Here, as in the previous two cases, the claims arise from employment information that the school prepares and makes available through their marketing materials.<sup>77</sup> Plaintiffs state that the employment statistics make “it reasonably appear to prospective law students that the jobs reported were full-time permanent positions for which a J.D. degree was required or preferred.”<sup>78</sup> The plaintiffs then claim that DePaul wanted the employment statistics to leave this impression

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<sup>72</sup> *Id.* at 19-20 (internal citations omitted).

<sup>73</sup> *Id.* at 20 (internal citations omitted).

<sup>74</sup> *Phillips v. DePaul University*, 2012 WL 4000001 (2012).

<sup>75</sup> *Id.*

<sup>76</sup> *Casey Sullivan, Illinois Judge Tosses Lawsuit Against DePaul University*, 2012 WL 5248086, Oct. 23, 2012.

<sup>77</sup> *DePaul University*, 2012 WL 4000001.

<sup>78</sup> *Id.*

with prospective students.<sup>79</sup> DePaul, according to the plaintiffs, published exaggerated employment statistics with the intention of convincing more students to come to DePaul.<sup>80</sup>

The plaintiffs claim that the employment statistics were

incomplete in materially misleading ways: (1) the jobs reported included any type of employment regardless of whether a J.D. degree was required or preferred; (2) the jobs reported included part-time positions and temporary full-time positions; and (3) the jobs reported included “research assistant,” “intern” and other “make-work” positions, including jobs provided by DePaul to its own graduates until they found jobs requiring a JD degree.<sup>81</sup>

The plaintiffs then state that the employment statistics “omitted and/or concealed material information . . .,” which included considering graduates employed in “business” that any non-law graduate could have gotten; the data was collected via voluntarily returned surveys; of these surveys, only a small percentage were returned; there was no information about whether those employed were in positions that required a J.D. or preferred a J.D.; there was no breakdown of how many graduates had full-time or part-time or temporary positions; and the employment data was not audited or verified in some other way.<sup>82</sup>

In this case, the plaintiffs also make the argument that, because DePaul released this information, the school created a special duty to ensure the information provided was not materially misleading or missing information to prevent it from being materially misleading.<sup>83</sup> Plaintiffs also claim that they became a member of the “DePaul Family” because of their enrollment, which resulted in forming a duty on DePaul’s part to provide them with non-

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<sup>79</sup> *Id.*

<sup>80</sup> Sullivan, *supra* note 76.

<sup>81</sup> *DePaul University*, 2012 WL 4000001.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

misleading statistics and information.<sup>84</sup> The court was not convinced by this argument.<sup>85</sup> The court determined that “[a]s prospective students, Plaintiffs had no relationship with DePaul, much less a special relationship which would give rise to any duty.”<sup>86</sup> Furthermore, the court says that plaintiffs did not allege any facts that showed any sort of special relationship as a result of the plaintiffs becoming DePaul students.<sup>87</sup> Also, there is no Illinois precedent that states that there is a fiduciary obligation owed to a student from the school.<sup>88</sup> This court found that “Plaintiffs allege that they reasonably relied on the Employment Information because a prospective student would not contemplate that a law school would publish materially misleading information and would not believe there was a need to verify the information provided.”<sup>89</sup> Ultimately, all of the plaintiff’s claims were dismissed because they could not maintain a cause of action on any of the claims based on the facts alleged.<sup>90</sup> However, the plaintiffs’ attorney said he plans to appeal the decision.<sup>91</sup>

The case against Thomas Jefferson School of Law (TJSL) is different from the other cases mentioned thus far because it was not dismissed before trial as the other cases were.<sup>92</sup> The court found that representations the law school made are material to a potential law student and his decision to enroll in the school.<sup>93</sup> However, the background information is similar to the other cases. The Plaintiffs in this case graduated from TJSL and claim to have been misled by

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<sup>84</sup> *Id.*

<sup>85</sup> Sullivan, *supra* note 76.

<sup>86</sup> *DePaul University*, 2012 WL 4000001.

<sup>87</sup> *Id.*

<sup>88</sup> Sullivan, *supra* note 76.

<sup>89</sup> *DePaul University*, 2012 WL 4000001.

<sup>90</sup> *Id.*

<sup>91</sup> Sullivan, *supra* note 76.

<sup>92</sup> *Alaburda v. Thomas Jefferson Sch. of Law*, 2012 WL 6039151 (2012).

<sup>93</sup> Greg Moran, *Suit Against Thomas Jefferson Law School Goes Forward*, UT SAN DIEGO, Dec. 8, 2012 available at <http://www.utsandiego.com/news/2012/dec/08/suit-against-thomas-jefferson-law-school-goes-forward/#>.

employment statistics provided by TJSL that were allegedly false and inaccurate.<sup>94</sup> The amended complaint alleges numerous bad acts by TJSL, including

that TJSL has a policy of (1) routinely counting unemployed graduates as ‘employed’; (2) shredding critical documents relating to Defendant’s employment data; (3) counting unemployed graduates as ‘unknown’ in order to improperly skew the data; (4) reporting unpaid volunteers and interns [as] ‘employed’, in violation of the NALP and ABA guidelines; and failing to record the source of the employment information it receives and using generally unreliable sources.<sup>95</sup>

The complaint goes on to allege that plaintiffs together “owe \$650,000 in connection with their law school (sic) education and that plaintiffs would never have enrolled in the school if they knew that TJSL manipulated or inflated its employment data.”<sup>96</sup> The plaintiffs “seeks damages and restitution in the amount of all tuition and fees that [TJSL] received from the plaintiffs.”<sup>97</sup> The judge in this case considered *Gomez-Jimenez*,<sup>98</sup> but felt the pleadings and alleged damages were pled in such a way to keep this case alive at least into discovery.<sup>99</sup> It is too soon to tell if this case will have an effect on the other pending law school misrepresentation cases. It also remains to be seen if the reasonable person standard will be applied in this case.

## II. Reasonable Person Standard

### a. Background Info

The reasonable person standard is a simple concept that most law students learn about in their first year courses. The same basic concept can be found in many areas of the law,

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<sup>94</sup> *Alaburda*, 2012 WL 6039151.

<sup>95</sup> *Id.* (internal citations omitted).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Gomez-Jimenez v. New York Law Sch.*, 103 A.D.3d 13, 20, 956 N.Y.S.2d 54, 61 (2012) leave to appeal denied, 2013-190, 2013 WL 1235500 (N.Y. Mar. 28, 2013) (internal citations omitted).

<sup>99</sup> *Alaburda*, 2012 WL 6039151.

particularly torts and contracts. The first case to mention the “reasonable man” was decided in 1837.<sup>100</sup> The concept is referred to in many different ways including: “prudent man,”<sup>101</sup> “man of average prudence,”<sup>102</sup> “ordinarily prudent man,”<sup>103</sup> “typical prudent man,”<sup>104</sup> and “average person of ordinary prudence.”<sup>105</sup> It is an amorphous idea, but it often comes down to whether a reasonable person would have acted in one way or another. In cases involving negligence, the reasonable person standard is used to determine the duty owed to another. Also, the reasonable person standard can be modified. For example, in a case dealing with whether a coal company was negligent the court used the following standard, “a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition[.]”<sup>106</sup> There are countless examples of the reasonable person standard and the modified reasonable person standard in many different areas of the law.

### **b. Reasonable Law School Applicants**

The problem is that judges are using their knowledge of the legal market and imputing that knowledge as something law school applicants know or should have known. Consider who is the reasonable, or in other words the average, law school applicant? The American Bar Association (ABA) Section of Legal Education and Admissions to the Bar says, “[t]here is no single path that will prepare you for a legal education. Students who are successful . . . come from many walks of life and educational backgrounds.”<sup>107</sup> Law school applicants could be

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<sup>100</sup> *Vaughan v. Menlove*, 3 Bing.N.C. 468, 132 Eng.Rep. 490 (1837).

<sup>101</sup> *Drown v. New England Tel. & Tel. Co.*, 81 Vt. 358, 70 A. 599 (1908).

<sup>102</sup> *Davis v. Concord & Montreal R. Co.*, 68 N.H. 247, 44 A. 388 (1894).

<sup>103</sup> *Osborne v. Montgomery*, 203 Wis. 223, 234 N.W. 372 (1931).

<sup>104</sup> *Warrington v. New York Power & Light Corp.*, 252 App. Div. 364, 300 N.Y.S. 154 (1937).

<sup>105</sup> *Charbonneau v. MacRury*, 84 N.H. 501, 153 A. 457 (1931).

<sup>106</sup> *Black Beauty Coal Co. v. Fed. Mine Safety & Health Review Comm’n*, 703 F.3d 553, 558 (D.C. Cir. 2012).

<sup>107</sup> ABA, PREPARING FOR LAW SCHOOL, *available at* [http://www.americanbar.org/groups/legal\\_education/resources/pre\\_law.html](http://www.americanbar.org/groups/legal_education/resources/pre_law.html).

freshly minted college graduates, returning to school after a brief career, or significantly older after having a long career.<sup>108</sup>

Furthermore, law school applicants come from highly diverse educational backgrounds. For example, at Michigan State University College of Law, the 2012 incoming class was made up of approximately fifty different undergraduate majors.<sup>109</sup> The most common undergraduate majors included more traditional paths to law school, such as political science (sixty three students), criminal justice/criminology (nineteen students), psychology (eighteen students), history (seventeen students), English (fourteen students), communications (twelve students), and pre-law (seven students).<sup>110</sup> Other undergraduate majors included aerospace engineering (one student), agriculture (one student), art history (one student), biology (three students), classics (one student), drama/theatre arts (one student), elementary education (one student), French (one student), industrial management (one student), music (two students), physical education (one student), pre-med (one student), religion/religious studies (one student), speech (one student), and women's studies (one student).<sup>111</sup> The reasonable pre-law student likely knows more about the current conditions in the legal employment market than another person coming from a non-legal background.

Even if a law school applicant does his due diligence, researches employment statistics from other sources, ask questions of administrators at the law school, and takes other such cautionary measures, it is likely the law school applicant will still not have a clear picture of his prospects at graduation. For example, many law schools employ their own graduates after

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<sup>108</sup> *Id.*

<sup>109</sup> MICHIGAN STATE UNIVERSITY COLLEGE OF LAW, UNDERGRADUATE MAJORS REPRESENTED, *available at* <http://www.law.msu.edu/admissions/majors.html>.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

graduation for a set period of time.<sup>112</sup> This practice was not disclosed until recently, and it made it impossible to determine the impact of the positions on the total employment figures.<sup>113</sup> While the disclosure of such employment is an improvement, some students who entered law school prior to the disclosure of this school funded employment had no way of knowing the true employment statistics because of these school funded, temporary positions.

Another example of how a diligent law school applicant can be misled even after independent research is the broad definition of what is considered to be “employed.” NALP’s methodology for calculating graduates employment rate includes jobs that are “full-time, part-time, temporary, permanent, law-related or not.”<sup>114</sup> Furthermore, the ABA requires employment statistics be reported with the following classifications full-time and part-time jobs and short-term and long-term jobs.<sup>115</sup> In attempting to follow this requirement, Cooley was unable to determine the status of some students after the surveys were returned and additional investigation was completed by the school.<sup>116</sup> For these graduates, “Cooley stated that ‘the default classification for those lacking complete data was full-time/long-term unless Cooley had evidence to contradict that classification.’”<sup>117</sup> Therefore, a student researching this data from the ABA or NALP could come across statistics that are false, numbers that show full-time, long-term

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<sup>112</sup> Trachtenberg, *supra* note 3.

<sup>113</sup> *Id.*

<sup>114</sup> NALP, METHODOLOGY FOR CALCULATING GRADUATE EMPLOYMENT RATE, *available at* [http://www.nalp.org/uploads/Employment\\_Rate\\_Calc.pdf](http://www.nalp.org/uploads/Employment_Rate_Calc.pdf) (2013).

<sup>115</sup> Trachtenberg, *supra* note 3 (*quoting Class of 2011 Employment Statistics*, T.M. COOLEY SCH. L. (Mar. 30, 2012), [http://www.cooley.edu/consumerinformation/\\_docs/2011\\_Graduate\\_Employment\\_Report.pdf](http://www.cooley.edu/consumerinformation/_docs/2011_Graduate_Employment_Report.pdf)).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (*quoting Class of 2011 Employment Statistics*, T.M. Cooley Sch. L. (Mar. 30, 2012), [http://www.cooley.edu/consumerinformation/\\_docs/2011\\_Graduate\\_Employment\\_Report.pdf](http://www.cooley.edu/consumerinformation/_docs/2011_Graduate_Employment_Report.pdf)).

jobs that are actually part-time and or short-term jobs.<sup>118</sup> Even a law school graduate working as a store clerk, would be considered to be employed.<sup>119</sup>

A final example is some schools omit from their graphical depictions of employment statistics unemployed graduates.<sup>120</sup> Professor Trachtenberg uses several examples of this, one of which is Rutgers-Camden 2011 graduate graphs that imply that 90.45% of its graduates have full time jobs.<sup>121</sup> The truth is that only “90.45% of *employed* students (only 84.32% of the class was employed)” had full-time jobs, which is “about 76% of the overall class.”<sup>122</sup> Professor Trachtenberg then goes on to describe other graphs that have the same flaws.<sup>123</sup> A prospective law student has no required courses they must take prior to entering law school,<sup>124</sup> so some students may have never taken a statistics class and may be incapable of understanding this information in a way that does not makes it materially misleading. This is highly misleading, and “[t]hese statistics are far less encouraging than the 84% employment figure touted at the top of the [Rutgers-Camden’s website].”<sup>125</sup> In addition, because the percentages add up to 100% students that are not proficient in statistics and statistical analysis will likely interpreted these graphs as a representation of all graduates, or at least all graduates whose employment is known, as opposed to a representation of all employed graduates.

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<sup>118</sup> *Id.*

<sup>119</sup> BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 71 (The University of Chicago Press 2012).

<sup>120</sup> Trachtenberg, *supra* note 3.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> ABA, *PREPARING FOR LAW SCHOOL*, available at [http://www.americanbar.org/groups/legal\\_education/resources/pre\\_law.html](http://www.americanbar.org/groups/legal_education/resources/pre_law.html).

<sup>125</sup> Trachtenberg, *supra* note 3.

### c. Why The Courts Should Depart from the Reasonable Person Standard

The primary reason to depart from the reasonable person standard is that there is no average law school applicant.<sup>126</sup> Law students come from such diverse backgrounds that to impute certain knowledge to this group as a whole is absurd. A potential law student, who is intimately aware of the legal profession and the current conditions in the legal employment field, regardless of how they came to possess that knowledge, should not set the standard that would be applicable to all law school applicants.

Also, a judge who is in the midst of the legal employment market should not be setting the standard of what a law school applicant ought to be aware of based on what the judge perceives as reasonable. One example is in *Cooley*, where the court determined that asking about the average starting salary and whether it included zero for the graduates who are self employed “is the kind of question that a person serious about considering [the average starting salary] statistic would ask.”<sup>127</sup> A judge with his advanced reasoning skills, and what he might consider, is not the appropriate standard for what a law school applicant reasonably should consider. The court goes on to say that “it is clear that the Employment Report has competing representations of truth. With red flags waving (sic) and cautionary bells ringing, an ordinary prudent person<sup>128</sup> would not have relied on the statistics to decide to spend \$100,000 or more.”<sup>129</sup> It is not appropriate for a judge to substitute his judgment for a law school applicant’s judgment. The standard is a reasonable person or reasonable law applicant standard, not a reasonable judge standard, which would raise the standard far beyond a reasonable person standard.

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<sup>126</sup> See *supra* Part II.b.

<sup>127</sup> *MacDonald v. Thomas M. Cooley Law Sch.*, 880 F.Supp.2d 785, 796 (W.D. Mich. 2012).

<sup>128</sup> This is also known as a reasonable person.

<sup>129</sup> *Cooley*, 880 F.Supp.2d at 797.

Furthermore, law schools purposefully recruit students from different backgrounds because of the added diversity these students bring to the law school. Law schools claim that diversity in backgrounds benefits the school and the learning environment at the school.<sup>130</sup> While *Grutter v. Bollinger* deals only with racial diversity, the fact remains that law schools attempt to create a student body that is diverse in as many ways as possible. Students from different backgrounds may not have the familiarity with the legal market. It is unreasonable to say, as the *Cooley* court said, that “it would be unreasonable to continue to rely on the Employment Reports because of the economy’s massive downfall, which hit the legal business as hard as any.”<sup>131</sup> Not all students are familiar with the legal market, and since the legal market has always been one of the fields that lay people view with a large amount of respect and hold its members in high esteem, it is not unreasonable for someone who is unfamiliar with the profession to believe that lawyers are, if not immune to market pressures, in a better position than most other professions. This is particularly reasonable in light of the employment numbers that the schools are so keen on marketing to prospective students.

Finally, while using a reasonable person standard may help the law schools in the short term by avoiding liability, setting a standard that tells students that law schools can distribute information to them that is “inconsistent, confusing, and inherently untrustworthy”<sup>132</sup> will harm law schools much more in the long term. Some people already consider law school to be a bad investment.<sup>133</sup> Over time, a probable result is that law schools themselves become “inherently untrustworthy.” If law schools are permitted to produce information that cannot be easily

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<sup>130</sup> *Grutter v. Bollinger*, 539 U.S. 306, 328, 123 S.Ct. 2325, 2338, 156 L. Ed. 2d 304 (2003).

<sup>131</sup> *Cooley*, 880 F.Supp.2d at 798.

<sup>132</sup> *Id.* at 796.

<sup>133</sup> Annie Lowrey, *When Law School Becomes a Bad Investment*, THE WASHINGTON POST (Oct. 30, 2010) available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/30/AR2010103004638.html>.

understood by potential law school applicants, more and more law students and alumni will be angry when they graduate and are unable to find a legal job. Some of these angry alumni have gone on to create blogs that put law schools in a negative light, and unfortunately these blogs are getting more and more attention.<sup>134</sup> These so called “scamblogs” are portraying law schools in a highly negative, but often justified, light.<sup>135</sup> As long as law schools can continue to get away with “inherently untrustworthy” marketing schemes because reliance on their materials is unreasonable, there will be significant damage being done to all law schools as a result. There is no doubt that damage is being done to law schools. Judge Quist in the *Cooley* decision said it himself — *caveat emptor*.<sup>136</sup>

#### **d. Why The Courts Got it Wrong**

In applying a reasonable person standard to the law school misrepresentation cases, the courts are damaging the prestige of law schools, as well as creating an injustice for at least some of the Plaintiffs. First, law schools are being damaged because courts are telling prospective students that even if the school publishes material that is misleading, and in some cases outright false,<sup>137</sup> that the law student should have been more careful. Judge Quist, in the *Cooley* decision, said it himself — *caveat emptor*.<sup>138</sup> All law schools, as a result of these court decisions, will be lumped together as untrustworthy, and the students are now “being warned by state and federal judges that they cannot take at face value the employment information [law schools] supply.”<sup>139</sup>

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<sup>134</sup> See Daniel D. Barnhizer, *Cultural Narratives of the Legal Profession: Law School, Scamblogs, Hopelessness, and the Rule of Law*, 2012 MICH. ST. L. REV. 663 (2012).

<sup>135</sup> *Id.* at 681.

<sup>136</sup> *Cooley*, 880 F.Supp.2d at 799.

<sup>137</sup> *Id.* at 794.

<sup>138</sup> *Id.* at 799.

<sup>139</sup> Brian Tamanaha, *Law Schools Suffer Loss in Lawsuits*, BALKINIZATION (Sept. 19, 2012) available at <http://balkin.blogspot.com/2012/09/law-schools-suffer-deep-loss-in-lawsuits.html>.

The courts also got this decision wrong because there will be an injustice worked on at least some plaintiffs or would be plaintiffs. As pointed out by Professor Tamanaha, it is not easy to find true employment statistics.<sup>140</sup> Both Judge Schweitzer, in the New York Law School case, and Judge Cohen, in the DePaul Law School case, asserted “that there was ample available public information on the true employment prospects.”<sup>141</sup> However, it is very difficult to locate all-inclusive employment statistics for individual schools.<sup>142</sup> In addition, a law school may report data in a way that is different from other law schools, or the law school may even report the data in a different way from one year to another.<sup>143</sup> Professor Tamanaha goes on to say,

[a] sophisticated and suspicious prospective student would have been able to figure out that the employment numbers posted by many law schools are incomplete and untrustworthy, but they would not have been able to find out the actual employment numbers. It was only after the lawsuits were filed that more detailed information became available.<sup>144</sup>

There are prospective law students who did research to truly determine if law school, and particularly if one law school over another, was a good decision.

The decisions of these courts will work an injustice on some of these plaintiffs, even after the plaintiff did their due diligence that the courts are presuming they did not do. This is not the result our legal system should strive for. Instead, our legal system should at least consider the individual facts of the plaintiff’s case before dismissing it, particularly in situations as those mentioned above. If even the judges are saying that prospective law students cannot trust their own law schools for candor, then this will become an even larger problem in the future.

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Janine Robben, *Cream and Sugar With That Law Degree?*, 72 NOV OR. ST. B. BULL. 19, Nov. 2011.

<sup>144</sup> Tamanaha, *supra* note 139.

### III. A Better Standard: Justified Reliance, a Subjective Standard

There is a better standard, which could be applied to these cases. The standard comes from bankruptcy law in cases of fraud, and is known as justifiable reliance. The Supreme Court of the United States has held this standard to be less demanding than reasonable reliance.<sup>145</sup> In *Field v. Mans*, Mans had purchased property from the Fields and paid a portion of the price in cash and personally guaranteed a promissory note, which was “secured by a second mortgage on the property,” for the remainder of the purchase price.<sup>146</sup> Contained in the mortgage deed was “a clause calling for the Fields' consent to any conveyance of the encumbered real estate during the term of the secured indebtedness, failing which the entire unpaid balance on the note would become payable upon a sale unauthorized.”<sup>147</sup> This clause was triggered when Mans’s corporation “convey[ed] the property to a newly formed partnership without the Fields' knowledge or consent.”<sup>148</sup> Then, Mans asked the Fields for “a waiver of their rights under the due-on-sale clause, saying that he sought to avoid any claim that the clause might apply to arrangements to add a new principal to his land development organization.”<sup>149</sup> However, Mans did not ask for their consent to his actions, nor did he inform them that he had already conveyed the property.<sup>150</sup> The Fields offered to waive their rights for \$10,500.<sup>151</sup> Mans then countered with an offer of \$500, but then nothing ever came of this.<sup>152</sup>

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<sup>145</sup> *Field v. Mans*, 516 U.S. 59, 116 S. Ct. 437, 133 L. Ed. 2d 351 (1995).

<sup>146</sup> *Id.* at 61.

<sup>147</sup> *Id.* at 61-62.

<sup>148</sup> *Id.* at 62.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Carrie Bland, *Field v. Mans and justifiable reliance under Section 523(a)(2)(A) of the Bankruptcy Code: determining who is an experienced horseman*, HIGHBEAM BUSINESS (Feb. 1, 1997), <http://business.highbeam.com/127/article-1G1-20346617/field-v-mans-and-justifiable-reliance-under-section>.

<sup>152</sup> *Id.*

Approximately three and a half years after purchasing the property and three years after the conveyance, Mans sought Chapter 11 Bankruptcy.<sup>153</sup> Through their lawyer, the Fields discovered the conveyance Mans had made, and filed a complaint in Mans's bankruptcy proceeding saying that when Mans conveyed the property his repayment had become due and so the amount due to the Fields should not be discharged.<sup>154</sup>

The bankruptcy court in this case “found that Mans's letters constituted false representations on which petitioners had relied to their detriment in extending credit.”<sup>155</sup> However, in following circuit precedent, there is a requirement that the Fields “make a further showing of reasonable reliance, defined as ‘what would be reasonable for a prudent man to do under those circumstances.’”<sup>156</sup> The bankruptcy court then

held that a reasonable person would have checked for any conveyance after the exchange of letters, and that the Fields had unreasonably ignored further reason to investigate in 1988, when Mr. Field's boss told him of a third party claiming to be the owner of the property.<sup>157</sup>

The court ultimately found that since the Fields were “unreasonable in relying without further enquiry on Mans's implicit misrepresentation about the state of the title,” Mans's debt was dischargeable.<sup>158</sup> The Supreme Court granted certiorari because there was a split among the Circuits on this issue.<sup>159</sup>

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<sup>153</sup> *Field*, 516 U.S. at 62.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 62-63.

<sup>156</sup> *Id.* at 63.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Carrie Bland, *Field v. Mans and justifiable reliance under Section 523(a)(2)(A) of the Bankruptcy Code: determining who is an experienced horseman*, HIGHBEAM BUSINESS (Feb. 1, 1997), <http://business.highbeam.com/127/article-1G1-20346617/field-v-mans-and-justifiable-reliance-under-section>.

The Court then discusses the history of 523(a)(2)(A) and (B) and the legislative intent in excluding a reasonable reliance requirement in 523(a)(2)(A) because “Congress added an element of reasonable reliance to [] 523(a)(2)(B).”<sup>160</sup> Furthermore, 523(a)(2)(A) “refer[s] to common-law torts,” and as such the terms used by Congress keep their “accumulated settled meaning under . . . the common law.”<sup>161</sup> After the Court rejected the old reasonableness standard, it must then find and apply the correct standard.<sup>162</sup> In finding the correct standard, the Court looks to the Restatement (Second) of Torts, which was published just before Congress passed the laws in question here.<sup>163</sup> The section of the Restatement that “deal[s] with fraudulent misrepresentation states that both actual and ‘justifiable’ reliance are required.”<sup>164</sup> The Restatement explains that “upon justifiable reliance by explaining that a person is justified in relying on a representation of fact ‘although he might have ascertained the falsity of the representation had he made an investigation.’”<sup>165</sup> The Court points out that while the “reliance on the misrepresentation must be justifiable . . . this does not mean that his conduct must conform to the standard of the reasonable man.”<sup>166</sup> The Court spends a good deal of time explaining the difference between reasonable and justifiable.<sup>167</sup> “Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than

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<sup>160</sup> *Field*, 516 U.S. at 64-67.

<sup>161</sup> *Id.* at 69 (internal quotations omitted).

<sup>162</sup> *Id.* at 67.

<sup>163</sup> *Id.* at 70.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 70-71.

<sup>167</sup> Carrie Bland, *Field v. Mans and justifiable reliance under Section 523(a)(2)(A) of the Bankruptcy Code: determining who is an experienced horseman*, HIGHBEAM BUSINESS (Feb. 1, 1997) <http://business.highbeam.com/127/article-1G1-20346617/field-v-mans-and-justifiable-reliance-under-section>.

of the application of a community standard of conduct to all cases.”<sup>168</sup> There is a limit to this, as mentioned in a comment, a person is

required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. Thus, if one induces another to buy a horse by representing it to be sound, the purchaser cannot recover even though the horse has but one eye, if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect. On the other hand, the rule stated in this Section applies only when the recipient of the misrepresentation is capable of appreciating its falsity at the time by the use of his senses. Thus a defect that any experienced horseman would at once recognize at first glance may not be patent to a person who has had no experience with horses.<sup>169</sup>

The Court then cautions that this new standard does not relegate all reasoning and that “[t]he subjectiveness of justifiability cuts both ways, and reasonableness goes to the probability of actual reliance.”<sup>170</sup> The example the Court uses is one where a sophisticated creditor, such as a consumer finance company, “encourage such falsity [like lying about financial condition] by their borrowers for the very purpose of insulating their own claims from discharge.”<sup>171</sup> The Court wants to make clear that while the justifiable reliance standard is less demanding than reasonable reliance, it will vary based on the facts and parties involved in the case.<sup>172</sup>

This standard would be a better fit for the law school misrepresentation cases for many reasons. First, a justifiable reliance standard would be a better fit in the law school misrepresentation cases than a reasonable reliance standard because there is no such thing as an “average law school applicant.”<sup>173</sup> The justifiable reliance standard as applied by the Supreme

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<sup>168</sup> *Field*, 516 U.S. at 71.

<sup>169</sup> *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 541 (1976)).

<sup>170</sup> *Id.* at 75.

<sup>171</sup> *Id.* at 76-77.

<sup>172</sup> *Id.*

<sup>173</sup> *See supra* Part II.b.

Court would be able to compensate for the large differences between law school applicants so each case could be evaluated based on the “qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases.”<sup>174</sup> Where one would be plaintiff has vast legal experience and is well aware of the current legal job market, that plaintiff cannot close his eyes to the realities of the job market, but rather it will be determined that his reliance was not justified. However, a would be plaintiff that is the first person in her family to go to college, let alone graduate school, and is totally unaware of the hardships facing law school graduates, should be judged under a justifiable reliance standard, and her reliance on the law school employment statistics could be justified. This same reasoning would protect those law school applicants who are recruited by law schools because of their diversity and background. As a result of this standard being subjective, each case would have to be evaluated on its own merits, but this would have other benefits as well.

Next, a justifiable reliance helps relieve the tension between what a judge, who is in the midst of the legal employment market, and a lay person know about the prospects in the legal employment market. Judges are uniquely positioned to see the difficulties young law school graduates may have in finding employment because many judges have law clerks, the judge gets to see the trials and tribulations their clerks go through in attempting to find full-time employment. Judges also may apply their own beliefs about how they would have acted as a prospective law student. Furthermore, judges, whether appointed or elected, have a special skill set that few others possess. Since many judges are selected because of their reputations as great lawyers, they are the best of the best in a way. To hold a law school applicant to a standard that

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<sup>174</sup> Field, 516 U.S. at 71.

seems reasonable to a seasoned and accomplished lawyer turned judge does not seem reasonable. A young college graduate, or even college student, making the decision to go to law school is not yet thinking like a lawyer, and therefore should not be held to a standard that is beyond what most law school applicants will do, even if that seems “reasonable” to a judge.

Finally, a justifiable reliance standard will help guard the reputation of legal education and law schools in America. The message these cases are sending to the country as a whole is that law schools and their marketing tactics are “inherently untrustworthy.”<sup>175</sup> Law school should not be a place where the buyer should have to beware, rather it should be a place where the law schools has an attitude of absolute candor to both prospective and current students, encouraging students to make decisions for their future because it is in the student’s best interests, even if it is not the most profitable for the school. Law schools can recover from the hit that they have taken thus far, but there may be a point of no return where the reputation of law schools becomes so tarnished it can never be saved. The justifiable reliance standard would, at a bare minimum, allow some cases beyond the initial summary judgment stage, and likely would allow some plaintiffs to prevail on fraud and misrepresentation claims. This would serve as an incentive for the law schools to publish more reliable statistics.

The justifiable reliance standard forces those schools that otherwise might “fudge” their numbers the incentive to play fair, while protecting other schools that are open and upfront about their employment statistics. Now, “since most law schools [are inflating employment numbers], it wasn’t wrong, and any school that did not boost numbers would suffer next to competitor schools that engaged in the practice.”<sup>176</sup> The idea that we have to do it because everyone else is

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<sup>175</sup> *MacDonald v. Thomas M. Cooley Law Sch.*, 880 F.Supp.2d 785, 798 (W.D. Mich. 2012).

<sup>176</sup> BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 71 (The University of Chicago Press 2012).

doing it too is harming the entire legal profession. This new standard would encourage law schools to be more upfront about employment prospects, and if individual schools choose not to change their ways, then their students who justifiably rely on their misleading statistics will be entitled to some form of relief. This will protect the reputation of law schools, and it will protect the future of the law. As the court in the case against NYLS said, “the law is what the lawyers are. And the law and the lawyers are what the law schools make them.”<sup>177</sup> Law schools have great power in shaping the minds of the next generation of law students, and “with great power comes great responsibility.”<sup>178</sup>

One side effect of implementing the justifiable reliance standard would be that class actions would no longer be appropriate. Since the standard would be a subjective test, each plaintiff would need to bring their own claims. This would allow a court to consider this plaintiff individually. However, this would not be an insurmountable problem for the plaintiffs because if plaintiffs are able to recover individually, they will still be able to find lawyers willing to take on their case. Furthermore, the cases discussed above were small class actions ranging in size from four named class members to twelve named class members.<sup>179</sup> The justifiable reliance standard would benefit plaintiffs more than being unable to certify as a class would hurt them. Therefore, giving up class actions would be a small price to pay, to be entitled to this lower standard of review.

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<sup>177</sup> *Gomez-Jimenez v. New York Law Sch.*, 103 A.D.3d 13, 19-20, 956 N.Y.S.2d 54, 60-61 (2012) leave to appeal denied, 2013-190, 2013 WL 1235500 (N.Y. Mar. 28, 2013).

<sup>178</sup> *Spider-Man, Peter Parker/Stan Lee* (2002) available at [http://www.imdb.com/title/tt0145487/trivia?tab=qt&ref\\_=tt\\_trv\\_qu](http://www.imdb.com/title/tt0145487/trivia?tab=qt&ref_=tt_trv_qu).

<sup>179</sup> *Cooley*, 880 F.Supp.2d at 788 (W.D. Mich. 2012) (twelve class members); *Gomez-Jimenez*, 943 N.Y.S.2d 834 (2012) (nine class members); *Phillips v. DePaul University*, 2012 WL 4000001 (2012) (nine class members); *Alaburda v. Thomas Jefferson School of Law*, 2012 WL 6039151 (2012) (four class members).

#### **IV. Conclusion**

The reasonable person standard, as used in the law school misrepresentation cases, is unreasonable. There is no reasonable law school applicant, law students vary in their backgrounds, educational fields, and ages. Therefore, it is unreasonable to say that the reasonable prospective law student would or should act in a certain way in regards to law school's published employment data. A prospective law student who studied math and statistics as an undergraduate may take a different view of the employment statistics than another prospective student with a different background. An objective standard in these cases is not working. In order to protect both the unsuspecting law school applicants and the institution of legal education, a change must be made. Thus, by changing the standard from a reasonable person standard to justified reliance standard, the courts would be able to protect those people who subjectively depended on the law schools marketing materials, while at the same time protecting law schools from themselves and the damages they are inflicting on the legal institution.