



by Brenda K. Radmacher and Joel C. Gerson

TROUBLE AT SCHOOL

For-profit career colleges have faced suits and investigations for misleading advertising, predatory lending, and inflated job placement numbers

THE FOR-PROFIT career college industry nationally represents more than 1,000 colleges and institutions, over 12 percent of the higher education enrollment.¹ In recent years, however, some for-profit career colleges have been under fire. In 2009, the U.S. Government Accountability Office conducted an investigation into the enrollment practices of for-profit career colleges and found that at least four out of 15 colleges “encouraged fraudulent practices.”² The U.S. Department of Education and state attorneys general in a number of states—including California, Massachusetts, and Florida—have investigated and pursued claims for misleading advertising and inflating job placement numbers, among others.

In addition to battling claims on the regulatory and prosecutorial front, for-profit career colleges have faced a number of claims by current and former students alleging misrepresented job placement rates and other statistics. These students have asserted causes of action for fraud, negligent misrepresentation, and unfair business practices.

In California, many of the student claims are based on Section 94800 of the California Education Code and Sections 17200 and 17500 of the Business and Professions Code, which is where the Private Postsecondary and Vocational Education Reform Act of 2009 is codified. The act provides rules for when and how most schools can operate, as well as a list of approved and prohibited business practices. Students asserting claims under section 94800 generally allege that the school they attended either operated in an unapproved

manner, or engaged in prohibited business practices, such as promising or guaranteeing employment upon graduation. Section 94897(b) specifically states that institutions shall not “promise or guarantee employment, or otherwise overstate the availability of jobs upon graduation.”³

As a representative example, in 2012, students filed a class action lawsuit against the United Education Institute (UEI) alleging violations of various sections of the California Education Code and Business and Professions Code based upon misrepresentations about student prospects of receiving “a well-paying job upon graduation.”⁴ The students alleged that UEI represented that it “employed skilled and aggressive career services personnel that would work extensively with [students]” in postgraduate job searches.⁵ The students claimed that they remained jobless after graduation and, as a result, were unable to pay off federal student loans.⁶ The parties stipulated to binding arbitration pursuant to the arbitration clause in the enrollment agreement. In January the class was certified and defined as all students who graduated from UEI’s California campuses on or after

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October 15, 2008, and enrolled before August 22, 2013, and, within six months of graduation, did not find employment working at least 32 hours per week in a single position within their field of study.⁷

In addition to claims under the Education Code, students frequently allege claims under Business and Professions Code Sections 17200 and 17500. Section 17200 prohibits unfair competition by prohibiting any “unlawful, unfair or fraudulent business act or practice” and any “unfair, deceptive, untrue or misleading advertising.”⁸ Section 17500 specifically prohibits untrue or misleading advertising that is known, or which reasonably should be known, to be untrue or misleading.⁹

In 2004, for example, a student filed a class action lawsuit against Microskills San Diego L.P. (Microskills), accusing the post-secondary vocational school of using outdated statistical information to induce potential students into believing that the high-tech industry was booming with high-paying jobs available to its graduates.¹⁰ The complaint alleged that Microskills did not provide accurate information of postgraduate employment rates, thereby misleading students.¹¹ Microskills moved to compel arbitration, which was denied, and lost on appeal.¹² In 2006, Microskills closed its doors, leaving over 100 students with no option to complete their degrees. In 2007, the California attorney general and the San Diego district attorney’s office filed a complaint against Microskills alleging unfair business practices pursuant to Sections 17200 and 17500.¹³ In 2008, the company settled and agreed to pay \$300,000 in restitution to 71 students.¹⁴

In conjunction with these statutory claims, students have alleged common law claims of fraud and negligent misrepresentation. Fraud generally occurs when someone gains something of value, usually money or property, by knowingly making a false representation of a material fact to another individual. To succeed on a fraud claim, a student must prove: 1) the school made a representation to the student that was materially false, 2) the school knew that the representation was false when made, or that it made the representation recklessly and without regard for its truth or falsity, 3) the school intended to defraud the student or to induce the student’s reliance, 4) the student reasonably relied on the representation, and 5) the student was harmed.¹⁵ Students that have alleged fraud against a for-profit college or vocational school typically claim that a college counselor misrepresented future job prospects to them before they started at the school.

Negligent misrepresentation occurs when a party asserts a fact that is not true and for which it has no reasonable ground for believing to be true. Students asserting negligent

misrepresentation tend to claim that the school made misrepresentations to them through a school’s advertisements, website, or recruiters. To prove negligent misrepresentation students must show that 1) the school misrepresented a fact, 2) the school had no reasonable ground for believing the fact to be true, 3) the school intended to induce the students’ reliance on the misrepresented fact, 4) the students reasonably relied on the misrepresentation, and 5) the students were harmed.¹⁶ The main difference between a fraud and negligent misrepresentation claim is that negligent misrepresentation does not require an element of scienter or intent.

In *Goehring v. Chapman University*, three Chapman University law students from the school’s inaugural class alleged both fraud and negligent misrepresentation claims against their former school. The students claimed that Chapman University Law School did not fully disclose its ABA accreditation process and falsely represented that students would be eligible to sit for the California bar exam without accreditation.¹⁷ However, the students failed to satisfy the damages elements for their causes of action because they were unable to prove that their damages were directly related to their reliance on the representations made by Chapman University.¹⁸

While fraud and misrepresentation claims have been difficult to establish against for-profit career colleges, claims under other statutes have been successful. In *Spielman v. Expression Center for New Media*, for example, students sued their former school under the now-repealed Private Postsecondary and Vocational Education Reform Act of 1989.¹⁹ The act prohibited private postsecondary educational institutions from misrepresenting their business in statements made to students.²⁰ Rather than reading all the elements of common law misrepresentation into the statute, the court allowed for a remand so that the students’ claims could be interpreted under the plain meaning of the statute.²¹ The court noted that its own conclusion is “buttressed by the fact that there are similar statutes... which have been found not to include the elements of common law fraud unless those elements are made express in law.”²²

Corinthian Colleges Case Study

By understanding the statutory and common law claims brought by students, for-profit career colleges can be better equipped to take preventative measures to avoid these claims. Educators can also learn from the travails of other institutions, such as Corinthian Colleges. Founded in 1995, Corinthian was a profitable educational institution with more than 100 college campuses. However, in October 2013, the California Attorney General filed a complaint against Corinthian and

its subsidiaries for misrepresenting job placement rates to students and investors, false advertising, and unlawful enrollment provisions barring student claims.²³ The complaint accused Corinthian of marketing false advertisements to potential students that were “isolated,” “impatient,” individuals with “low self-esteem,” and to students who have “few people in their lives who care about them” and who are “stuck” and “unable to see and plan well for the future.”²⁴ These allegations were made to show the predatory tactics. In addition, Corinthian allegedly used military symbols to attract veterans. The claims in the case were that Corinthian specifically targeted students who would be less likely to complete the program or who might be more easily swayed to enter the program based on the representations of the job placement rates.

In 2014, following this complaint, the Consumer Financial Protection Bureau sued Corinthian for predatory lending against its students and illegal debt collection.²⁵ Two years before that, Corinthian had drawn the attention of the U.S. Senate’s Health, Education, Labor, and Pension Committee, which studied the enrollment, retention rates, and profits of for-profit universities.²⁶ The committee’s study concluded “Corinthian charges some of the highest tuition prices,” yet it was “unclear whether taxpayers or students [were] obtaining value from the \$1.7 billion investment that taxpayers made in Corinthian in 2010.”²⁷

The U.S. Department of Education thereafter began financially monitoring Corinthian. Because of the department’s intervention, Corinthian was forced to sell a dozen of its campuses and to close 85 more.²⁸ In April, Corinthian closed the remainder of its campuses, leaving 16,000 students displaced. Corinthian has since filed for chapter 11 bankruptcy, which has effectively stayed litigation against the school.²⁹ As a result, the Department of Education instituted a federal loan forgiveness program to help relieve the financial burden on the students affected by the closing of Corinthian’s campuses.³⁰

Effectively Preventing Student Claims

The case of Corinthian Colleges is an extreme example of what can happen to for-profit career colleges that mislead students with aggressive marketing and deceptive advertising. However, there are many more career colleges and schools in the business of providing quality trade and technical skills to students who need them. Those schools can learn from the Corinthian example and some simple strategies to avoid claims by students.

First, schools should strive to be open and honest with students about their chances of graduating and finding a full-time job. It is imperative to establish transparency with students at the outset in order to establish

MCLE Test No. 252

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. The U.S. Government Accountability Office will not interfere with the practices of for-profit career colleges.
True.
False.
2. Students commonly bring claims against schools under the Business and Professions Code.
True.
False.
3. The California Education Code provides guidelines for how schools can operate.
True.
False.
4. A school cannot be disciplined for overstating the availability of jobs upon graduation.
True.
False.
5. A school can freely advertise truthful information about graduation rates and prospects for employment.
True.
False.
6. Student claims against a school for unfair business practices can lead to a school's closing.
True.
False.
7. Schools are permitted to advertise information that they reasonably could know may be misleading.
True.
False.
8. A student can bring both statutory and common law claims against a school.
True.
False.
9. In order to succeed on a claim for fraud, a student does not need to prove that the school knew that the representation it was making was false.
True.
False.
10. In order to succeed on a claim of negligent misrepresentation, a student does not need to prove that the school intended to induce the student's reliance.
True.
False.
11. In order to succeed on a claim of negligent misrepresentation, a student does not need to prove that he or she was harmed.
True.
False.
12. The main difference between fraud and negligent misrepresentation is that fraud requires an element of scienter.
True.
False.
13. A student is able to sue a former school even if he or she is not a current student at that school.
True.
False.
14. The Consumer Financial Protection Bureau may protect the interests of students against predatory lending and illegal debt collection.
True.
False.
15. The U.S. Senate's Health, Education, Labor, and Pension Committee studies the enrollment, retention rates, and profits of for-profit universities.
True.
False.
16. California state-funded schools are not required to comply with California's record management program.
True.
False.
17. Schools should make statistics easily available to prospective students regarding tuition costs, graduation rates, and hiring opportunities.
True.
False.
18. Schools should only maintain records for one year in case a claim is later brought against them.
True.
False.
19. In *Goehring v. Chapman University*, the student claimants were able to succeed on their causes of action despite their inability to prove that their damages were directly related to their reliance on representations made by the school.
True.
False.
20. Both the California Code of Regulations and the Code of Federal Regulations govern record retention.
True.
False.

MCLE Answer Sheet #252



TROUBLE AT SCHOOL

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Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

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13. True False
14. True False
15. True False
16. True False
17. True False
18. True False
19. True False
20. True False

trust and to avoid unnecessary student claims. This can most simply be done by making statistics regarding student costs, graduation rates, and hiring opportunities easily available on the school website, in advertising materials, and elsewhere.

Second, schools should maintain a strong training program that instructs counselors and marketers on what they can and cannot say. Since many of the claims involve a counselor's guaranteeing job placement or particular job outcomes, schools must stress to counselors the importance of avoiding overblown promises. Schools should retain documentation of the training process.

Third, schools should have students sign an acknowledgement before enrolling that they understand their counselor is not guaranteeing them a job. The acknowledgement should include language that shows the student was not relying on any other form of advertisement when enrolling. This will help preclude claims under the California Education Code as well as allegations of negligent misrepresentation.

Fourth, schools should also regularly refer to state and federal enforcement agencies such as the Bureau for Private Postsecondary Education for important updates and proposed regulations to ensure compliance. The U.S. Department of Education has also estab-

lished a Negotiated Rulemaking Committee on Gainful Employment to prepare proposed regulations that establish standards for programs that prepare students for gainful employment in a recognized occupation.³¹

Finally, one of the most important steps in preventing student claims is to maintain complete records. Having hard documentation of the practices and procedures of the school will go leagues in helping prove that the school abided by state and federal laws. Schools should have an organized document retention policy, including electronic documents, so that these documents may be preserved for electronic discovery if litigation appears imminent. Schools should maintain records for at least four years, since this is the point at which claims of fraud and breach of contract expire. If a student has not filed a lawsuit within three years of the date of the alleged fraud (or four years in the case of a breach-of-contract claim), then he or she is barred from bringing that claim. Schools should also stay current on statutory record retention requirements. California state-funded schools are required to comply with California's record management program in order to "apply efficient and economical management methods to the creation, utilization, maintenance, retention, preservation and disposal of state records."³² The California Edu-

cation Code and Code of Regulations, as well as Code of Federal Regulations, include sections governing record retention.³³

The rising trend of student and agency claims against for-profit career colleges poses a risk of which schools should be wary. By understanding the current climate surrounding for-profit career colleges, common claims, and engaging in appropriate preventative measures, schools can place themselves in a strong position to effectively manage the risk that student claims present. ■

¹ THE CONDITION OF EDUCATION, NAT'L CTR. FOR EDUC. STATISTICS (May 2015) available at <http://nces.ed.gov>.

² FOR-PROFIT COLLEGES: UNDERCOVER TESTING FINDS COLLEGES ENCOURAGED FRAUD AND ENGAGED IN DECEPTIVE AND QUESTIONABLE MARKETING PRACTICE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE (Aug. 4, 2010), available at <http://www.gao.gov>.

³ EDUC. CODE §94897.

⁴ Cordova, et al. v. United Educ. Inst., No. 37-2012-00083573-CU-BT-CTL, 2012 WL 5193823 *passim* (San Diego Super. Ct. Oct. 15, 2012) (Cross-Action Complaint for Damages, Injunctive Relief, and Restitution).

⁵ *Id.*

⁶ *Id.*

⁷ Cordova, et al. v. United Educ. Inst., No. 37-2012-00083573-CU-BT-CTL, 2012 WL 5193823 *passim* (San Diego Super. Ct. Feb. 1, 2013) (Stipulation for Binding Arbitration and Stay of Action and [Proposed] Order Thereon).

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⁸ CAL. CODE REGS. tit. 6, §17200. This section expands the reach of government agencies monitor the advertising claims by colleges and vocational schools by providing that a government agency can seek recovery on behalf of the students for false advertising. *See also* CAL. CODE REGS. tit. 6, §76212.

⁹ The Education Code also prohibits the use of certain advertising and marketing schemes, such as soliciting students for enrollment by publishing a “help wanted” column or using “blind” advertising that fails to identify the institution. *See* EDUC. CODE §94897.

¹⁰ *Gilchrist v. Microskills San Diego L.P.*, 2004 WL 5656978, at *2 (Complaint for BUS. & PROF. CODE §§17200, 17500: Restitution and Injunctive Relief Based on Violation of the California Education Code, Misrepresentation).

¹¹ *Id.* at *3.

¹² *See Smith v. Microskills San Diego L.P.*, 153 Cal. App. 4th 892 (2007). Microskills argued that it was a third-party beneficiary of the arbitration provisions of the Sallie Mae note.

¹³ *See generally* California v. Memarzadeh, et al. (2007) (Complaint for Injunction, Civil Penalties and Other Equitable Relief), available at https://aog.ca.gov/system/files/attachments/press_releases/2007-05-05_Microskillscomplaint.pdf.

¹⁴ Press Release, DA Reaches Settlement with Microskills Vocational School; Students paid Restitution, Office of the District Attorney County of San Diego (Sept. 16, 2008), available at <http://www.sdca.org>.

¹⁵ *Small v. Fritz Cos., Inc.*, 30 Cal. 4th 167, 173 (2003).

¹⁶ *Fox v. Pollack*, 181 Cal. App. 3d 954, 962 (1986).

¹⁷ *Goehring v. Chapman U.*, 121 Cal. App. 4th 353, 360 (2004).

¹⁸ *Id.* at 366.

¹⁹ *Spielman v. Ex'pression Ctr. for New Media*, 191 Cal. App. 4th 420 (2010), as modified (Dec. 30, 2010).

²⁰ *Id.* at 428.

²¹ *Id.* at 433.

²² *Id.* at 432. *See, e.g.*, CORP. CODE §§25110, 25120, 25130, 25503, 25400(d), 25500.

²³ California v. Heald College, LLC, et al., 2013 WL 5576241, at *1 (Complaint for Civil Penalties, Permanent Injunction, and Other Equitable Relief).

²⁴ *Id.* at *3.

²⁵ Consumer Fin. Prot. Bureau v. Corinthian Colleges, Inc., No. 14-7194 (E.D. Ill.) (Complaint for Permanent Injunction and Other Relief).

²⁶ SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS, *Executive Summary*, FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS, SENATE.GOV (2012), available at <http://www.help.senate.gov>.

²⁷ SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS, *Corinthian Colleges*, FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS, SENATE.GOV (2012), available at <http://www.help.senate.gov>.

²⁸ Chris Kirkham, *Corinthian closing its last schools; 10,000 California students displaced*, L.A. TIMES (Apr. 26, 2015), available at <http://www.latimes.com>.

²⁹ Chris Kirkham, *O.C. firm Corinthian Colleges files for bankruptcy protection*, L.A. TIMES (May 4, 2015), available at <http://www.latimes.com>.

³⁰ Information on Debt Relief for Students at Corinthian Colleges (Everest, Heald, and WyoTech), available at <https://studentaid.ed.gov>.

³¹ *See* 34 C.F.R. §668.401 *et seq.*; *see also* 34 C.F.R. §600 and GAINFUL EMPLOYMENT, FEDERAL REGISTER (last viewed Oct. 21, 2015), available at <https://www.federalregister.gov>.

³² GOV'T CODE §14740.

³³ CAL. CODE REGS. tit. 5, §§400, 401, 431, 432, 16020-16027; *see also* EDUC. CODE §§94900-94900.7; 34 C.F.R. §§74.53, 80.42 (b)(4).

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