

## NEW THIRD CIRCUIT PRECEDENT ON CLASS CERTIFICATION FOR INFLATED TUITION CLAIMS

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The United States Court of Appeals For The Third Circuit issued a precedential opinion on Tuesday August 16, 2016, in *Harnish, et al. v. Widener University School of Law*, No. 15-3888. The opinion is well written and reasoned and involves an appeal from a denial of class certification. The proposed class consisted of Widener University School of Law students claiming that the institution misrepresented post-graduation employment statistics resulting in an inflated tuition price in violation of the New Jersey Consumer Fraud Act and the Delaware Consumer Fraud Act. The proposed class included students who enrolled from 2006 up to the date of Complaint filing during the statutory period (Note - Widener corrected its employment statistics in 2011).

The District of New Jersey found that plaintiffs failed to meet the requirement of Fed. R. Civ. P. 23(b)(3) - that common questions predominate - because plaintiffs could not prove that they were harmed by common evidence. In so finding, the District Court rejected plaintiffs' damage theory because there were variations in the student's

employment outcomes. In reviewing this holding, the Third Circuit explored the distinction between "fact of damages" and "measure/ amount of damages" and found that the District Court was concerned with both damage inquiries and the "District Court injected an individualized question (employment outcomes) that has never been at issue



Court, however, had used a "benefit of the bargain" analysis and found that some students, those who did gain full employment, received the expected benefit. The Third Circuit did not understand plaintiffs to have "benefit of the bargain" claims, but again found the error to be harmless. Ultimately the Third Circuit likened

prove that the alleged misrepresentations (as to employment statistics) empowered defendant Widener to "charge more across the entire market." (p. 19). In citing New Jersey case law, the Third Circuit held that "recognizing 'price inflation' as a 'cause' of 'ascertainable loss' is essentially the same as extending the fraud-on-the-market presumption to all consumer fraud cases" and that this theory is not recognized "outside of the federal


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... ." (p. 10). However, the Third Circuit found this error to be harmless since the "inflated tuition theory of damages" at issue was not supported by class wide evidence.

The Third Circuit then analyzed the alleged harm using a "fraud-on-the-market" analysis assessing the value of the law degree at the time of enrollment as affected by the probability of full-time legal employment after graduation. The District

the plaintiffs' claims to price-inflation which is not a cognizable theory (outside of a federal securities-fraud context) under New Jersey or Delaware law. The Third Circuit found that the goal of the plaintiffs' expert was to prove that law school tuition is an efficient market; one that responds to public information - a "prerequisite to . . . a fraud-on-the-market argument." (p. 18). The Third Circuit believed that plaintiffs sought to

securities fraud context." (p.20). Consequently, the plaintiff failed to propose a cognizable theory of damages sufficiently supported by class-wide evidence.

The full opinion text is publicly available on the Third Circuit's website at [www2.ca3.uscourts.gov/opinarch/153888p.pdf](http://www2.ca3.uscourts.gov/opinarch/153888p.pdf) (last visited May 4, 2017). Judges Chagares, Krause, and Barry presiding. 

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