

In most cases the plaintiffs were suing for fraud and misrepresentation to recover the cost of unused dance lessons. The patterns of the alleged fraudulent misrepresentations were extremely similar. Plaintiffs went to the dance studios and purchased small courses of dance lessons. They were told that they had natural ability and could become professional dancers.²⁰⁵ A Florida judge was emphatic in his condemnation of the methods used to sell an elderly woman dance lessons.

These dance lesson contracts...were procured from her by means and methods which went beyond the unsavory, yet legally permissible, perimeter of 'sales puffing' and intruded well into the forbidden area of undue influence, the suggestion of falsehood, the suppression of truth, and the free exercise of rational judgment.²⁰⁶

In a case in the Supreme Court of Iowa, the court noted that the members of the Arthur Murray staff were carefully schooled and supervised in the art of high-powered salesmanship. A twenty-two page document instructed the staff in selling the lessons. The court's decision is presented in the following seven rules:

1. How to prevent a prospect from consulting his banker, lawyer, wife or friend.
2. Avoid permitting your prospect to think the matter over.
3. Tell the prospect that has never danced before that it is an advantage and tell the prospect that has danced before that it is an advantage.
4. To dance with the prospect and then tell the prospect that the rhythm is very good, their animation or self confidence is good, that their natural ability is very good. That they will be an excellent ballroom dancer in much less time and that if they didn't have natural ability it would take twice as long.
5. To summarize the prospect's ability to learn as follows: 'Did you know that the three most important points on this D.A. are: Rhythm, natural ability and animation? You've been graded excellent in all three.'
6. In quoting the price for various courses, the instructor is supposed to say 'The trouble with most people is that they dance lifelessly, but as I told you on your analysis, you have animation—vitality in your dancing. No matter what course you decide on you're going to be a really smooth dancer (men would rather be a smooth dancer—women would rather be a beautiful, graceful dancer).'
7. To use 'emotional selling' and the instructor is tutored as follows: 'This is the warm-up period and is a very important part of your interview.' You have proved to him by now that he can learn to dance; now you must appeal to his emotions in such a way that he will want lessons regardless of the cost.²⁰⁷

A second common experience shared by plaintiffs was that they received bronze, silver, and gold medals for proficiency in dancing.²⁰⁸ Although they were told that it takes approximately two to four years to qualify for a Bronze Medal, five to seven years for a Silver Medal, and at least 1200 hours to qualify for a Gold Medal, the plaintiffs generally received all the medals in the first year. Each time they paid more fees they became eligible for another medal.

LOOKING FOR LOVE IN ALL KINDS OF PLACES: FRAUD IN DANCING AND DATING

PATRICIA PATTISON*
DONALD E. SANDERS**

I. INTRODUCTION

Thirty to forty years ago Arthur Murray Dance Studios (hereinafter referred to as Arthur Murray) were frequent defendants in fraud actions brought by elderly women, who were told that they possessed great potential as dancers. Many courts allowed recovery based on the particular vulnerability of the plaintiffs; the opinions of the expert dance instructors gained the same status as factual misrepresentations. The cases were controversial, questioning whether there were material facts that were justifiably relied upon and appear to be based on unfairness to vulnerable plaintiffs who may have been looking more for self-esteem and relationships than dance lessons.

More recently the same issues seem to be arising in suits against online dating services. Dissatisfied customers are accusing online matchmaking services of engaging in deceptive practices. Suits have been filed against Match.com and Yahoo! Group, two of the participants in a very lucrative online dating industry. The plaintiffs in both the Arthur Murray cases and the online dating cases have one thing in common: they purchased hope, relied on the defendants' promises and suffered resulting injury. This paper will examine the elements of fraud as presented in both the dancing and the dating cases, drawing comparisons and noting distinctions.

II. HISTORICAL PERSPECTIVE: THE DANCING CASES

A. RECOVERY FOR FRAUD

In the late sixties and early seventies there were numerous suits brought against dance studios, usually against those holding an Arthur Murray franchise.²⁰² The facts of the cases are similar; most plaintiffs were older, single women.²⁰³ The Iowa Supreme Court characterized the plaintiff as "a lonely and elderly widow who fell for the blandishments and flattery of those who saw some 'easy money' available."²⁰⁴

*J.D. Professor of Business Law, Texas State University—San Marcos.

** J.D. Professor of Business Law, Texas State University—San Marcos.

²⁰² See Arthur Murray, Inc. v. Parris, 420 S.W.2d 518 (Ark. 1967); Holland v. Nelson, 5 Cal App.3d 308, 85 Cal Rptr. 117 (1970); Nichols v. Arthur Murray, Inc., 248 A.C.A. 754, 56 Cal. Rptr. 728 (1967); People v. Arthur Murray, Inc., 238 Cal. App. 2d 333, 47 Cal. Rptr. 700 (1966); Bryne v. Harvey, 211 Cal. App. 2d 92, 27 Cal. Rptr. 110 (1962); Chas. L. Harney, Inc. v. State of California, 217 Cal. App. 77, 31 Cal. Rptr. 524 (1963); Staples v. Arthur Murray, Inc., 253 Cal App.2d 507, 61 Cal. Rptr. 103 (1967); Adjustment Bureau, Inc. v. Rogers, 143 Colo. 480, 354 P.2d 605 (1960); Vokes v. Arthur Murray, Inc. 212 So.2d 906 (Fla. 1968); Syester v. Arthur Murray Dance Studio, 257 Iowa 613, 133 N.W.2d 666 (1965); Weil v. Arthur Murray, Inc., 67 Misc.2d 417, 324 N.Y. S.2d 381 (1971).

²⁰³ Only one case had a male plaintiff. See Adjustment Bureau, Inc. v. Rogers, 143 Colo. 480, 354 P.2d 605 (1960).

²⁰⁴ Syester v. Arthur Murray Dance Studio, 257 Iowa 613, 615, 133 N.W.2d 666, 668 (1965).

²⁰⁵ *Id.* at 618.

²⁰⁶ Vokes v. Arthur Murray, Inc. 212 So.2d 906 at 907 (Fla. 1968).

²⁰⁷ *Supra* note 3, at 671.

²⁰⁸ *Id.* at 907 and *supra* Weil note 1.

The cost to plaintiffs was tremendous. For example, from 1954-1960 one widowed plaintiff in her sixties paid \$33,497 for dancing lessons.²⁰⁹ In January, 2006 that would be the equivalent of \$224, 407.²¹⁰ The court commented, “there appears to have been an astoundingly successful selling campaign.”²¹¹

Regardless of the many hours of lessons, plaintiffs found that their dancing ability did not improve and brought suits for fraud against Arthur Murray, Inc. Juries were instructed on the elements of fraud, i.e., expression of opinion as distinguished from a statement of fact, fraudulent misrepresentation, and intent to mislead.²¹² Typically, juries were instructed that in order for plaintiffs to recover they had to carry the burden of establishing, by clear, satisfactory and convincing evidence, each of the following propositions:

1. That the defendants made one or more of the representations claimed by plaintiff.
2. That said statements, or one or more of them, were false.
3. That said false statements or representation were as to material matters with reference to the entering into the lesson contracts.
4. That the defendants knew the said representations, or one or more of them, were false.
5. That said representations were made with intent to deceive and defraud the plaintiff.
6. That the plaintiff believed and relied upon said false representations and would not have entered into the lesson contracts, except for believing and relying upon said misrepresentations.
7. That the plaintiff was damaged in some amount through relying on said representations.²¹³

Juries in various states found that plaintiffs were victims of a calculated course of intentional misrepresentations and awarded actual and punitive damages that today would range between two and three hundred thousand dollars.²¹⁴

On appeal the judgments of the lower courts were affirmed. The appellate courts found that the jury instructions were adequate and that there was evidence from which juries could find for plaintiffs. On the critical issue of determining statements of fact as distinguished from opinion or puffing, citing an earlier decision, the Iowa court said, “Ordinarily the question of whether the representations made are opinion or fact is for the jury to determine and depends upon the facts and circumstances in each case.”²¹⁵ Concerning fraud, a Florida court added:

Even in contractual situations where a party to a transaction owes no duty to disclose facts within his knowledge or to answer inquiries respecting such facts, the law is if he undertakes to do so he must disclose the whole truth.²¹⁶

The problems associated with dancing lessons became so pervasive that both the New York and California legislatures found it necessary to pass laws to protect the vulnerable victims. A New York court explained the purpose of the statute:

The statutory legislation became imperative by reason of the guile, deceit, shenanigans, and other artifices practiced and indulged in by vendors, franchisors, and entrepreneurs of like ilk in their dealings with the public and ultimate consumers which invariably resulted in the latter’s exploitations.²¹⁷

The New York statute provides that contracts in excess of \$500 for instruction in physical or social skills must be (1) for a precisely measured period of years and (2) paid in installments so that the total amounts paid shall not be more than 5% of the prorated costs of units of instruction actually received.²¹⁸ The statutory remedy is that the plaintiff can recover any amount paid in advance for instruction not received.

Plaintiffs in California who recovered under the Dance Act²¹⁹ were entitled to treble damages plus attorney’s fees.²²⁰ Finding “that there exists in connection with a substantial number of contracts for health and dance studio services, sales practices and business and financing methods, which have worked a fraud, deceit, imposition, and financial hardship upon the people of this State,”²²¹ like the New York legislature, the California legislature attempted to protect victims by providing for refunds for instruction not received.

B. THE RULE OF LAW

“Commitment to the rule of law is one of the core values of a liberal legal system. The adherents of such a system usually regard the concept of a ‘government of laws and not people’ as the chief protector of the citizens’ liberty.”²²² The line of cases that resulted in many plaintiffs’ recovery against the Arthur Murray Dance Studios has been criticized for violating the rule of law. Traditionally recovery for fraud had been permitted only when the defendant misrepresented a material fact. However, in the Arthur Murray cases, the courts permitted recovery when plaintiffs relied, to their detriment, on statements of opinion. One court, in going against the traditional requirements to prove fraud, reasoned:

The proper function of the judicial branch of government is not simply to interpret the law, as it may be coded. The common law is alive and well and is too vigorous to be embalmed in legal codes. The concept that the law is an ideal of justice for all, an ideal which contains the ability to change its forms and substance, if such change is necessary in the true administration of justice, is the concept that is called the common law. Thus the common law can amend itself to produce justice in areas where legislation is inadequate or impossible to be effective, bearing in mind at all times that “For justice, though she’s painted blind, is to the weaker side inclin’d” (Hudibras, pt. ii, c. 2, L. 709).²²³

Those who advocate for a strict rule of law would find that the term fraud has a plain meaning and is not subject to interpretation. No matter how persuasive the flattery of the dance instructors, elderly women still voluntarily agreed to purchase a large number of instruction hours. (One plaintiff actually purchased three lifetime memberships.²²⁴ Another was persuaded to sign, as maker, the promissory note that the studio was delivering to her as a refund.²²⁵) Following the rule

²⁰⁹ *Supra* note 3, at 669. *Supra* note 5, at 907 (another woman paid \$31,090). *Id.* at 669.

²¹⁰ U.S. Department of Labor, Bureau of Statistics, Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Apr. 9, 2006).

²¹¹ *Supra* note 3, at 669.

²¹² *Id.* at 673.

²¹³ *Id.* at 625.

²¹⁴ *Id.* at 623.

²¹⁵ *Id.* at 625 (citing *Christy v. Heil*, 255 Iowa 602, 606, 123 N.W.2d 408, 410 (1963)).

²¹⁶ *Supra* note 5, at 909.

²¹⁷ *Weil v. Arthur Murray, Inc.*, 67 Misc.2d 417, 419, 324 N.Y. S.2d 381, 384 (1971).

²¹⁸ N.Y. GEN. BUS. § 394(b) (McKinney 2002).

²¹⁹ CAL. OBLIGATIONS CODE §1812.50 (1961).

²²⁰ *Holland v. Nelson*, 5 Cal App.3d 308, 85 Cal Rptr. 117 (1970), *Staples v. Arthur Murray, Inc.*, 253 Cal App.2d 507, 61 Cal. Rptr. 103 (1967).

²²¹ CAL. OBLIGATIONS CODE §§1812.50 (1961).

²²² *John Hasnas, The Myth of the Rule of Law* (1995), WIS. L. REV. 199.

²²³ *Supra* note 16, at 420.

²²⁴ *Supra* note 3 at 617.

²²⁵ *Id.* at 623.

of law would have caused harsh results for the particularly vulnerable elderly women who were taken in by the Arthur Murray dance instructors. Therefore, a number of courts, in a number of different jurisdictions, determined to set aside the rule of law and to provide protection for the relatively weak victims.

One legal scholar has written a provocative and thoughtful article that asserts that there is no such thing as a government of laws and not people.²²⁶ He argues that the belief that a rule of law does exist constitutes a myth that serves to maintain the public's support for society's power structure.²²⁷ Following a lengthy listing and discussion of various legal disputes, including the dance studio cases, he concludes that, "there is no such thing as a government of law and not people. The law is an amalgam of contradictory rules and counter-rules expressed in inherently vague language that can yield a legitimate legal argument for any desired conclusion."²²⁸ He argues that the American public is in a "state of deep denial" when it believes in a rule of law. There are no objective rules of justice; the law is inherently political in nature. It is more comforting for American citizens to not recognize that their legal positions are as politically motivated as the positions of their opponents. He advocates a free market in legal services and concludes, "We must recognize that our love for the rule of law is unrequited, and that, as so often happens in such cases, we have become enslaved to the object of our desire."²²⁹

III. OVERVIEW OF ONLINE DATING SERVICES

In the previous discussion many situations were cited in which courts and state legislatures felt compelled to ignore the rule of law in order to protect a group of particularly vulnerable plaintiffs. In the dance studio cases elderly, lonely, poorly educated, women were taken advantage of by the innovative sales techniques, which included excessive flattery, of Arthur Murray dance instructors. It is clear that the women hoped to purchase more than dance lessons; they wanted to be loved and admired.

Currently existing is another group of plaintiffs who may be somewhat similar to the dance studio plaintiffs. This group is also seeking love and admiration, but their potential sources are online dating services, not dance studios. In the next section we will investigate to determine what kind of plaintiffs are involved. Are they similar enough to the dance studio plaintiffs so that they also require a bending of the rule of law to provide them protection by the courts?

In the previous section we saw that state courts were willing to bend the rule of law, if it really exists, to accommodate particularly vulnerable plaintiffs who were subjected to aggressive and outrageous selling techniques. In this section we will be looking at the user attributes of users of online dating service, comparing them to the dance studio plaintiffs. A number of scholars in economics and sociology have researched and published about online dating service users.²³⁰

A. ONLINE DATING PROCEDURES

Upon joining a dating service, users create profiles of themselves by responding to a number of mandatory questions. Generally the profiles are then displayed on a webpage and can be viewed by other members of the particular dating service. The questions solicit information about why the

²²⁶ *Supra* note 21 at 199.

²²⁷ *Id.* at 199.

²²⁸ *Id.* at 232.

²²⁹ *Id.* at 233.

²³⁰ Gunter J. Hitsch et al., *What Makes You Click: An Empirical Analysis of Online Dating* (paper presented at the meeting of the Allied Social Science Associations in Boston, January 6, 2006, on file with authors); Paul Hollander, *The Counterculture of the Heart*, (conference paper presented to the American Sociological Association, on file with authors); Kenneth M. Kambara, Ph.D., *The Social Construction of Online Dating: Towards an Understanding of Technological Use and Consumption*, (unpublished paper, on file with authors); James Houran & Rense Lange, *Expectations of Finding a "Soul Mate" with Online Dating*, 6 N. AM. J. PSYCHOL. 297 (2004).

users joined a dating service and their demographic, socioeconomic, and physical characteristics, as well as information about personality and values.

Before registering, many services allow potential users to browse current members, giving them teaser information and allowing them to see posted photos. After registering, users can interact with other members of the dating service. Services will vary in their procedures, but typically users will start a search by indicating a geographic region and age range for their potential partners. The user can click on the appetizer information of a potential mate to view more in-depth information. After reviewing the detailed profile the user can make contact with the member, most times by email. Some dating services do not permit open browsing of members, but make matches for the members based on a number of characteristics.²³¹ Some dating services claim to prescreen users for criminal and marital status, others do not.

B. USER CHARACTERISTICS

1. STATED REASON FOR USING AN ONLINE DATING SERVICE

Thirty-nine percent of the users of online dating services have said that they are hoping to start a long-term relationship.²³² Twenty-six percent are just looking or are curious and only 9% indicate that they are only interested in a short-term, casual relationship. Men are slightly more interested in casual relationships than women, but the most active participants of both genders are those interested in long-term relationships. Ninety-three percent have heterosexual preferences.

2. DEMOGRAPHIC/SOCIOECONOMIC CHARACTERISTICS

Economists have compared the reported characteristics of online dating services users with Community Survey Profiles (hereinafter referred to as CPA) from the same geographical areas.²³³ Generally, online dating sites attract users that are typically single, younger, more educated, and richer than the general population. There are many notable differences. First, there is an overrepresentation of men (approximately 55%) in the use of Internet dating services. Second, service users are more concentrated in the 26-35 year age range although the CSP median range is 36-45. Persons over 56 years of age are underrepresented in the group of service users, but they are also underrepresented in the group of Internet users. Third, the ethnic profile of service users is comparable to the ethnic makeup of the geographic region. Fourth, regarding marital status, 57% report that they are single, 24% are divorced, and 4% are separated. A small number (below 3%) of service users report that they are married, some happily, some not. Fifth, over 54% report having college or graduate degrees; that level of education is higher than the general population, but comparable to the Internet using population. Sixth, income profiles are also higher than the general population, but comparable to the population of Internet users. Almost 4% of dating services users report having incomes over \$200,000, compared to 0% of the general population.

3. PHYSICAL CHARACTERISTICS

Self-reported information indicated that 20% of men and 24% of women using the dating services possess very good looks and 49% of men and women have above average looks. A much smaller number (29% of men and 27% of women) described themselves as average. Even fewer

²³¹ <http://www.eharmony.com>. Only after the service has made the match are the users able to have limited communication with each other on the web site. Unless the users choose to "fast-track" the communication, email addresses are not exchanged until the users have communicated quite extensively on the web site (last visited Feb. 14, 2006).

²³² *Supra* note 29. (These characteristics come from a number of different sources, but the most complete study is Hitsch et al.).

²³³ *Id.* (The Hitsch research contrasted the dating site users with two sub-samples of the CSP. The first was a representative sample of the Boston and San Diego population and the second was a representative sample of Internet users).

(less than 1%) described themselves as below average in looks. Of those who chose to post a photo, only 24% of the men and 19% of the women described themselves as average or below.

Men using Internet dating services report weights that are fairly close to national averages, but the women reported weights that are lower than national averages. Women in the age group of 20-29 report weights about 6 pounds lower than national averages; women in the age group of 30-39 report weights 18 pounds lower than national averages; women in the age group 40-49 years old report weights 20 pounds lower than average. The stated height of both men and women is above national averages.

4. SOCIAL STIGMA

Traditionally, users of dating services were often viewed as socially marginal.²³⁴ Online dating was perceived to be for “the desperate, socially inept, and unattractive.”²³⁵ However, in recent years the perception has changed. In 2003, almost half of all single individuals in the United States had used online dating services.²³⁶ In September of 2002, “16.6 million people visited matchmaking Web sites ... a figure that has made Internet dating seem almost stigma-free.”²³⁷

People may be using online dating Web sites as a more efficient way to pursue serious and important relationships. Conventional methods such as introductions by friends or relatives, meetings at schools, work, recreational spots, special interest groups or at bars are often haphazard and frustrating. “The communication of intimate personal needs via terse advertisements may promise to be a more rational and effective approach to mate-selection than those which used to prevail in modern Western societies.”²³⁸ Studies also indicate that users of online dating services are emotionally well-balanced. As measured by attitudinal indicators, “individuals with intentions to use online dating are not motivated by positive distortions or unrealistic optimism.”²³⁹

5. A COMPARISON

A comparison of plaintiffs in the dance studio cases with the users of online dating services shows a dramatic difference in the personal characteristics of the two groups. The one thing they have in common is that they both used services to meet social, psychological, or emotional needs. However, this appears to be the only similarity. The plaintiffs in the Arthur Murray cases were characterized as particularly vulnerable; they were older, lonely, in lower income groups and not well educated. Their status compelled the courts to bend the rules of fraud in order to allow them to recover. In contrast, the users of online dating services are younger, better educated professionals in higher income groups. Because they lack vulnerability, it would be inappropriate to offer them special protection under the law. When they bring their suits for fraud they should be required to prove all the traditional elements of fraud, including misrepresentation of a material fact.

IV. MATCH.COM CASE AND THEORIES

The motivation for this paper is the recently filed case against Match.com, one of the more prominent Internet dating websites. The lawsuit was initially filed in the United States District Court, Central District of California, by Matthew Evans. Since the filing of the Original Complaint, the number of plaintiffs has grown to eight, seeking certification as a class action. The defendants in the suit include IAC/Interactive Corp. (hereinafter referred to as IAC), the alleged

²³⁴ Kambara, *supra* note 29 at 4; A. C. Aluvia & M.B. Adelman, *Formal Intermediaries in the Marriage Market: A Typology and Review*, JOURNAL OF MARRIAGE AND THE FAMILY, May, at 452, 453 (1992).

²³⁵ Kambara, *supra* note 29 at 4.

²³⁶ A. Mulrine, *Love.com: For Better or Worse, the Internet is Radically Changing the Dating Scene in the US*, 2004 US NEWS AND WORLD REPORT, September 29.

²³⁷ *Style Section*, N.Y. TIMES, November 24, 2002.

²³⁸ Hollander, *supra* note 29.

²³⁹ Houran, *supra* note 29.

owner of Match.com; Ticketmaster, as general partner of Match.com, L.P.; Match.com, L.P.; Match.com, as a subsidiary of IAC; Autumn Marzec, an individual; and ten individual defendants identified as Doe's 1-10. Although several of the claims for relief, such as unfair and deceptive business practices, are specific to California, in brief the broader stroke allegations of wrongdoing include the Racketeer Influenced and Corrupt Organization Act (hereinafter referred to as RICO), fraud, invasion of privacy, negligent misrepresentation, breach of implied covenant and fair dealing, and breach of contract.

Allegations in plaintiffs' 62 page complaint are numerous and often specific to one of the recited causes of action, such as the state claims. Essentially the suit, and all of its various causes of action, is based on fraudulent and deceitful activities. However, the more prominent actions complained of by the defendants may generally be summarized as follows:

- The use of fake *winks* (preliminary expressions of interest by another subscriber), in order to induce subscribers to purchase or renew memberships;
- Undisclosed limitations on the number of emails that could be sent via the site;
- Limitations on service and access to advertised offers;
- Defendant's use of agents or intermediaries purporting to be subscribers in order to induce legitimate members to purchase or renew memberships;
- Employees of Match.com acting as *date bait*, i.e., employees directed to contact and date subscribers in order to encourage renewal subscriptions and positive referral advertising.
- Match.com monitoring email communications between subscribers in order to further the effectiveness of the fake winks, emails, and date bait schemes.

Matthew Evans, the initial plaintiff, asserts that after being contacted by a *wink* from defendant Autumn Marzec he and Ms. Marzec had an initial date. During that date, Evans alleges he was told by Marzec that she was employed by Match.com as a member of a date bait team for the express purpose of dating subscribers in order to induce them to renew their memberships. Evans said Marzec told him she had responsibility for a *portfolio* of subscribers, of whom Evans was a member, and that she had access to their emails processed through Match.com. Marzec allegedly confirmed her assertions by displaying to Evans, during their date, a website wherein she could access the private accounts of subscribers. As confirming proof of Marzec's monitoring, when Evans contacted another subscriber (assumedly via Match.com) with his revelations and expressed thoughts of pursuing action against Match.com, Marzec contacted him by email within one day and, referencing Evans' email, requested he not go forward with his claim. To counter the allegations of Evans however, Marzec has reportedly executed an affidavit subsequent to initiation of the suit denying any relation to Match.com.

A. PRECEDENTS

Few cases are similar in fact and issue to the Match.com case. Most cases involving dating services do not serve as relevant authority because they are against individual defendants rather than cases against the dating service itself.²⁴⁰ Each of the two suits identified as being specifically brought by a subscriber against a dating service involved violation of a specific statute or statutes regulating dating services. *Grossman v. Matchnet PLC*²⁴¹ (hereinafter referred to as *Grossman*) resulted in a determination that the plaintiff, who was a subscriber to Matchnet's service, lacked standing to file suit due to technical failure within her pleadings. Irrespective of the dismissal, Justice Sullivan concurred with the results of *Grossman*. Sullivan's opinion was that the dating

²⁴⁰ *See, e.g.*, U.S. v. Fayne, 163 Fed.Appx. 785 (Ga Ct. App. 2005); Brown v. Strum, 350 F.Supp.2d 346 (Conn. 2004).

²⁴¹ *Grossman v. Matchnet PLC*, 782 N.Y.S.2d 246 (N.Y. App. Div. 2004).

service law of New York²⁴² did not apply to services such as that of Matchnet. Specifically, the defect perceived by Justice Sullivan was the passive nature of the Matchnet’s Internet dating service, whereas the statute anticipated a more active service role by the provider in matching subscribers. The statute defined the regulated activity as: “(a) ‘social referral service’ shall include any service for a fee providing *matching* of members of the opposite sex, by use of computer or any other means, for the purpose of dating and general social contact.” [emphasis added]²⁴³ Matchnet did not conduct any substantive *matching* services, but only provided essentially a clearinghouse for members to meet and interact.

Even though *Grossman* was dismissed on a pleading impropriety, the case did serve as precedent in case of *Doe v. Great Expectations*²⁴⁴ (hereinafter referred to as *Great Expectations*). It is difficult to identify any significant precedential value which could be relied upon, except perhaps that contained within the concurring opinion of Justice Sullivan. However, in the *Great Expectations* case, the court expressly found, in partial reliance on *Grossman* as well as a prior *Great Expectations*²⁴⁵ case, that contracts for Internet dating services (such as that of *Great Expectations*) were within the reach of the dating service law when the services “match members by creating a location and mechanism for members to assess each other by reviewing another member’s video, photograph and profile.”²⁴⁶ The Court did not perceive any distinction between reviewing videos, photographs, or profiles at a physical location and the same review by use of the Internet. The inclusion of *computers* within the Dating Service law terminology buttressed the Court’s decision that there was no legal distinction between the two methods. Having determined the dating law applicable to Internet dating services, the court in *Great Expectations* found both egregious overcharges for services and a failure to follow every requirement of the New York Dating Service Law, with a resulting award in the sum of the face amount of the contracts.

The importance of *Great Expectations* to the Match.com case is the willingness of some courts to apply state dating service statutes to the newer Internet dating services. Although not involving dating laws, two cases were filed by the states of Kansas and Wisconsin under their respective consumer protection acts. The Wisconsin suit settled for partial refunds of at least \$11,624 to eighteen consumers by Wisconsin Singles, Inc.²⁴⁷ The Kansas suit, based on the Kansas Consumer Protection Act and violations of the Kansas No-Call Act, resulted in \$215,000 award (for restitution) to eighty-six consumers by *Great Expectations*.²⁴⁸

B. STATE STATUTES

To date there appear to be eight states which have instituted statutes regulating the dating service or social referral industry, excluding those specific to international matching services. Many of the statutes were drafted prior to the use of online dating services and retain language geared toward matchmaking organizations and video dating. The New York statute in *Grossman* can be so characterized, but has obviously been interpreted broadly to be inclusive of the new technology. The degree to which actual matching of profiles is contemplated within the statute may, however, influence its application.

Although each such state statute will obviously be different those of other states, some commonalities can be identified from the chart below:

Table 1: Comparison of State Statutes

Attribute	AZ ²⁴⁹	CA ²⁵⁰	CN ²⁵¹	IL ²⁵²	MN ²⁵³	NY ²⁵⁴	OH ²⁵⁵	WI ²⁵⁶
Computer schemes specified / included	X	X ¹	X ¹	X	X	X	X ¹	X ¹
Required written contract ⁴	X	X	X	X	X	X	X	X
Three day right of rescission	X	X	X	X	X	X	X	X
Max. duration of contract	1yr	3yr		2yr	1.5yr	2yr	3yr	2 yr
Death terminates contract		X		X			X	
Relocation allows termination		X 50mi		X 20mi			X 25mi	
Contains prohibition to waiver of rights	X			X	X		X	
Prohibition of falsity, misrepresentation, or fraud by Service	X			X			X ²	
Prescribed form or notice		X	X	X	X	X	X	X
Civil damages	X	3x	X ²	3x	X	X	X	X
Atty. Gen. enforcement	X			X	X	X	X	X
Non-compliant contract may be declared void	X	X		X				X ³

¹ Although computers are not specified, a broad statement or selection by photograph, video or other means is included and would arguably cause inclusion.

² References another statute, such as deceptive trade practices.

³ “Unenforceable” rather than void.

⁴ Note that the Uniform Electronic Transactions Acts adopted by most, if not all, states would allow electronic formation in lieu of a written contract.

If applied, these statutes pose a significant risk to the numerous dating services. If the dating services must comply with each state’s dating service statutes, service providers such as Match.com will be required to tailor their contracts and disclosures to the requirements of the various states in which their members reside. Due to differences in each state’s statutes the dating services will have either one contract which satisfies all of the state statutes, or multiple contracts and disclosures identified to the state of residence of the member. The failure to comply could result in a range of damages from a mere refund of member fees to multiple damages in class actions.

An alternative to such tailoring would seem to be the use of a mandatory choice of jurisdiction and venue provision within the services contract. By placing the jurisdiction in a specific state the dating service could isolate compliance to that specific jurisdiction. But even with the use of an exclusive jurisdiction provision, uncertainty remains. A finding of unconscionability might result in the jurisdictional provision being stricken. Some states provide similar language within their statutes in addition to the general ability of the courts to affect such recourse.²⁵⁷ Moreover, there remains the possibility that, if a contract is perceived to violate a statute, a court may declare the contract void or unenforceable. Upon voiding the contract any mandatory choice of jurisdiction or venue selection provision would then also logically be void, possibly throwing the dating service

²⁴² N.Y. Gen. Bus. Law § 394-c.

²⁴³ *Supra* at note 41 at (1)(a).

²⁴⁴ *Doe v. Great Expectations*, 809 N.Y.S.2d 819, 2005 WL 2850902 (N.Y. City Civ. Ct.).

²⁴⁵ *Great Expectations Creative Management, Inc. v. Attorney-General of the State of New York*, 616 N.Y.S.2d 917 (Sup.Ct. N.Y. Co.1994).

²⁴⁶ *Doe v. Great Expectations*, 809 N.Y.S.2d at 820.

²⁴⁷ Wisconsin Dept. of Justice Press Release (June 13, 2005), http://www.doj.state.wi.us/news/nr061305_CP.asp (last visited Mar. 5, 2006).

²⁴⁸ *Wichita Business Journal* (Feb. 18, 2005), <http://wichita.bizjournals.com/wichita/stories/2005/02/14/daily37.html> (last visited Mar. 5, 2006).

²⁴⁹ Ariz. Rev. Stat. Ann. § 44-7151–§ 44-7156 (West 2006).

²⁵⁰ Cal. Civ. Code §1694–§ 1694.4 (West 2006)

²⁵¹ Conn. Gen. Stat. Ann. § 42-320–§ 42-322 (West 2006).

²⁵² 815 Ill. Comp. Stat. Ann. 615/5–615/55 (West 2005).

²⁵³ Minn. Stat. Ann. § 325G.23–§ 325G.28 (West 2005).

²⁵⁴ N.Y. Gen. Bus. Law § 394-c (West 2006).

²⁵⁵ Ohio Rev. Code Ann. § 1345.41–§1345.51 (West 2006).

²⁵⁶ Wis. Stat. Ann. § 100.175 (West 2006).

²⁵⁷ *See*, Del. Code. Ann. tit. 6 § 12A-117 (2005), Va. Code Ann. § 59.1-501.10 (2005).

into violation of any statutory requirements against which the now void contract would have provided protection.

Perhaps the best current indicator of the effectiveness of the jurisdictional provisions is that of known contested cases. Although Matchnet.com no longer appears to be a viable web URL, a review of one of its sister sites, American Singles, exhibits a jurisdictional provision granting California jurisdiction and venue, although curiously not exclusively. Assuming that Matchnet had a similar provision, the completion of the New York case calls into question the viability of the provision. Additionally, the current case involving Match.com is filed, and appears to be proceeding, in the United States District Court of California in spite of an exclusive jurisdiction and venue provision within the contract specifying the federal or state courts of Texas in Dallas or Collin Counties.²⁵⁸

C. ANALYSIS OF SELECTED ELEMENTS OF MATCH.COM

The underpinnings of the current suit against Match.com are alleged acts that were intended to, and did, deceive and defraud the plaintiffs. If successful, the risk to Match.com is estimated, according to the allegations in Plaintiffs' First Amended Complaint, "substantially in excess of \$100,000,000.00" based on the assumption of class action status and RICO application.²⁵⁹ Clearly, the success of plaintiffs in the Match.com case could be crucial in the operational methods of online dating services, and perhaps even their continued existence. The following analysis is not intended to be exhaustive, but rather will concentrate on the more generalized causes and some anticipated responses. In order to facilitate the following review, the existence of the facts alleged by plaintiffs are assumed to be proven.

1. RACKETEER INFLUENCED ORGANIZATION ACT

If the actions of Match.com are perceived to be in furtherance of fraud, the fact that they were conducted by use of wires may well lead to liability based on Racketeer Influenced Organizational Act (RICO).²⁶⁰ The interstate wire aspect of the statute is without question. The issue will be the existence of the "scheme...to defraud by means of false or fraudulent pretenses, representations, or promises."²⁶¹ Although the notification of members of possible matches to their profiles is certainly within the expected function of most services, should Match.com have engaged in a pattern of sending fictitious email messages, and more blatantly the dating teams, a finding of a pattern of fraudulent conduct would seem inescapable. In the Match.com case, the plaintiffs alleged that the defendant, either knowingly or negligently, allowed false and misleading profiles to be posted and remain on their website in order to bolster the visitor numbers and appeal to subscribers. Although not as deceptive as knowingly creating and using fictitious profiles (an often repeated speculation about online dating sites in general), knowingly allowing false profiles to remain on the Match.com system would further exhibit the website's pattern of misleading activities potentially leading to a finding of a RICO liability.

2. FRAUD AND DECEIT

While the same acts as used in the RICO claim understandably arise in the fraud claim, the addition of access to the plaintiffs' emails is further included. Specifically, fraud is alleged by the defendant's reading and use of the plaintiffs' emails in order to obtain specifics as to the plaintiffs' desires and to further facilitate the deceit of the plaintiffs by use of sham winks and dates. The issue is complicated by express permission being given to the defendant for access to emails:

You understand and agree that Match.com may review and delete any content, messages, double-blind emails, photos or profiles (collectively, "Content"), in each case in whole or in part, that in the sole judgment of Match.com violate this Agreement or which might be offensive, illegal, or that might violate the rights, harm, or threaten the safety of Members.²⁶²

The grant of access would seem altogether legitimate if applied to verify the security of the defendant's sites as well as to police content for objectionable material, such as obscenity, chain mail, and spam, identified in the contract and the privacy policies.²⁶³ However, if the defendant's review of email was for self-serving marketing purposes beyond legitimate access, the breadth of access to subscriber emails would become questionable.

Match.com acquired additional access rights to emails, albeit in a less than conspicuous way, by designating "the content of communications between you [*the subscriber*] and other members over the Site"²⁶⁴ as demographic information which may be collected. It could be argued that classifying access to the content of emails as *demographic information* is itself deceptive. *Demographic information* is ordinarily defined as that which involves the "characteristics of human populations, such as size, growth, density, distribution, and vital statistics."²⁶⁵ By way of utilizing *demographic* phrasing a subscriber may logically believe that Match.com is merely assembling statistics as to the makeup of its customer base and thereby be distracted from realizing the broad invasive grant. Such an allegation may have additional merit since the same privacy policy includes the classification "personal information" which would be much more likely to alert a subscriber to the intrusive nature of Match.com's activities. Beyond the mere reading of subscribers' emails, it may be outside the allowances of the contract to disseminate the emails to others (such as the date bait teams) if they are not employees or entities under common corporate control.

3. ELECTRONIC COMMUNICATIONS PRIVACY ACT—AN OVERLOOKED CAUSE?

The Electronic Communications Privacy Act²⁶⁶ (hereinafter referred to as the Privacy Act) prohibits, among other things, the interception of wire communications and the disclosure of the content of wire communications. The decision in *United States v. Councilman* (hereinafter referred to as *Councilman*)²⁶⁷ makes clear that viewing emails by an Internet service provider residing on its server constitutes an interception, unless falling within one of the statutory exceptions. In order to gain a competitive advantage, Councilman arranged to have all email arriving from Amazon.com reviewed without the knowledge or consent of the intended recipients. Councilman was prosecuted for conspiracy to violate the Privacy Act, sometimes known as the *wiretap act*, based on illegal interception of the communications. The defendant's assertion in *Councilman* was that at the time of reading the communications were not in transit, but instead in storage, and therefore no interception took place. The United States First Circuit Court of Appeals reversed the district court's ruling and held that reading emails sent through Interloc's email service constituted an interception within the meaning of the wiretap act thereby discounting Councilman's assertion that the email was in electronic storage. To Match.com the application is unmistakable. By reading the emails of subscribers, Match.com intercepted electronic communications and brought itself within the terms of the act. The issue of the violation then becomes whether or not Match.com's interception falls within an exception to the prohibition. One such exception involving consent provides:

²⁶² Match.com Terms of Use § 9(b) (as of Feb. 27, 2006).

²⁶³ *Id.*, § 9(d).

²⁶⁴ Match.com Privacy Policy, § "Information We Collect From You."

²⁶⁵ "Demography," *The American Heritage Dictionary of the English Language*, Fourth Edition (2000), as viewed at www.dictionary.com (last viewed Mar. 5, 2006).

²⁶⁶ 18 U.S.C.A. § 2511 (West 2006).

²⁶⁷ *United States v. Councilman*, 418 F.3d. 67 (1st Cir. Dec. 2005).

²⁵⁸ Match.com Terms of Use § 23 (as of Feb. 27, 2006).

²⁵⁹ *Evans v. Match.com*, Plaintiffs' First Amended Complaint, I ¶6.

²⁶⁰ 18 U.S.C.A. § 1343, 18 U.S.C.A. § 1961 (West 2006).

²⁶¹ *Id.*

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception *unless such communication is intercepted for the purpose of committing any criminal or tortious act* in violation of the Constitution or laws of the United States or of any State [emphasis added].²⁶⁸

The effectiveness of the consent provisions of the Match.com contract therefore becomes paramount. Even assuming effective consent, if the allegations of fraud are substantiated, the availability of the exception ceases due to the tortious conduct. The effect of failure to comply with a state's dating statute normally renders such a contract void. In such a case, the question arises whether the contract is *void ab initio* and thus the consent was never effective or whether the consent continues until the tortious conduct occurs.

Should violation of the wiretap act be alleged and proven, both criminal and civil remedies are available to the aggrieved party. For the first offense, civil damages are available in the sum of the greater of actual damages, or statutory damages not less than \$50 or more than \$500.²⁶⁹ If class action status is granted, such mandatory damages could be significant.

D. DATING SERVICE WEBSITE REVIEW

Regarding the ownership and operational strategies of the Internet dating service industry, it is enlightening to look at the breadth and construction of some of the websites devoted to dating services. This paper includes an appendix which details the number of web domains operating off of selected servers and also provides information concerning the ownership and operation of the dating service sites. The appendix was developed by determining the websites that resided on the same server as identified dating services. Also, in the case of multiple sites, many seem to lead to the same primary site. Although certainly not exhaustive, some review was made to reveal the *registrant*, who is presumably the owner or operator, of the individual web domain. Some operators, such as eHarmony, appeared to operate only three domains. Other operators were far more prolific in their web domain operation. If a web domain registrant owns numerous similar dating service websites without disclosure to subscribers of the commonality of the parent service, particularly if common databases of subscribers are used, allegations of deception would seem likely. Specifically, would it be deceptive if a subscriber unknowingly joined (particularly for a fee) two or more dating services with undisclosed commonality of ownership, if the pool of subscribers were the same for each service and therefore no advantage was gained by the subscriber? Such a cause of action seems speculative but may have merit if the Match.com suit is ultimately successful.

V. CONCLUSION

While the past Arthur Murray cases offer an intriguing comparison to the evolving online dating service cases, the correlation between the two circumstances mitigates against extension of the dancing cases to the current issues. As noted above, the dancing cases involved those who, though perhaps not suffering from diminished capacity, certainly were not of the same age, level of competence or education as the online dating plaintiffs. The Arthur Murray cases often manipulated the concept of fraud to fit the facts of the case. Those cases would have likely been better characterized by reference to equitable concepts, such as unconscionability, or distinction as an alternative concept in the nature of *equitable* fraud.

The Match.com case does not present the same circumstances. The plaintiffs are neither old nor somehow shunned by society as in the Arthur Murray cases. They have not been victimized to the degree of the Arthur Murray plaintiffs. While the Match.com and similar plaintiffs may have expended funds in membership fees, they have not been induced into multiple life memberships or into executing promissory notes payable to themselves. That is not to say that, if the facts are proven, the Match.com plaintiffs were not victimized; but the level of harm and their sympathetic character does not rise to that of the Arthur Murray plaintiffs.

From the authors' viewpoint as teachers, the current value of the Match.com case derives from its topical application and its connection to the life experience of our students. Communication is a key to learning, but the student's attention must be focused for communication to be effective. The Arthur Murray cases hold some marginal interest for people in their late teens and early twenties, but dance studios generally do not present any real connection to the student. On the other hand, all students are familiar with online and Internet dating services and many have firsthand experience. The contrast between the two circumstances presents an opportunity to display the interrelationship of legal reasoning and attributes to the development of case law and theory. In short, irrespective of the outcome of the Match.com and similar cases, they provide an avenue to grab the student's attention and make what is sometimes a stale theory into something of relevance.

²⁶⁸ 18 U.S.C.A. § 2511(2)(d).

²⁶⁹ 18 U.S.C.A. § 2520(c)(1)(A) (West 2006).

APPENDIX
SELECTED DATING SITE IP REVIEW
(ASSEMBLED MARCH, 2006)

Server ID	Site Name Searched	Name of Registrant	State of Registrant	# Sites on Server	Selected Name (domain) of Webs on Server
164.109.154.125	eHarmony.com	eHarmony.com	CA	3	www.Compatiblemarriage.info
		eHarmony.com	CA		www.Eharmony.com
66.36.243.23	allaboutsingles.com	Information Systems	CA	5	www.Allaboutsingles.com
		Information Systems	CA		www.Exoticagirls.com
		Information Systems	CA		www.Match-chat.com
		Information Systems	CA		www.Pornoworks.com
		Information Systems	CA		www.Rapiddating.net
64.16.64.48	americansingles.com*	Spark Networks PLC	CA	332	www.amercansingles.com
		Spark Networks PLC	CA		www.Cookforyourdate.com
		Spark Networks PLC	CA		www.Cupidnet.com
		Spark Networks PLC	CA		www.Datedition.com
		Spark Networks PLC	CA		www.Doyou2.com
		Spark Networks PLC	CA		www.go2love.com
		Spark Networks PLC	CA		www.Matchnetu.com
64.56.205.72	adultfriendfinder.com*	Friend Finder Inc	CA	44	www.adultfriendfinder.com
		Global Alphabet, Inc	CA (same as above)		www.getiton.com
		Global Alphabet, Inc	CA (same as above)		www.realsexacts.com
		Global Alphabet, Inc	CA (same as above)		www.sexatfirstclick.com
		Friendfinder Inc	CA (same as above)		www.hustlerpersonals.com
209.185.12.47	friendfinder.com*	Friendfinder, Inc.	CA	37	www.friendfinder.com
		Friend Finder Network	CA (same as above)		www.indianfriendfinder.com
		Friend Finder Network	CA (same as above)		www.germanfriendfinder.com
		Friend Finder Network	CA (same as above)		www.socialflirt.com
Server ID	Site Name Searched	Name of Registrant	State of Registrant	# Sites on Server	Selected Name (domain) of Webs on Server

66.48.37.88	dating.com*	Frontier Credit Corp.	CA	39	www.dating.com
		Frontier Credit Corp.	CA		www.bicurious.com
		Frontier Credit Corp.	CA		www.escortclub.com
		Frontier Credit Corp.	CA		www.gayhottotalk.com
64.105.175.12**	datingslage.com*	Semibase Inc., Ferdouse Khaleque	CA	42	www.datingsstage.com
		Semibase Inc., Ferdouse Khaleque	CA (same as above)		www.hellocutie.com
		Ferdouse Khaleque	CA (same as above)		www.menustation.com
64.16.64.50***	jdate.com*	Spark Networks PLC	CA	95	www.jdate.com
		Spark Networks PLC	CA		www.jewneology.org
		Spark Networks PLC	CA		www.jgeography.com
207.245.46.145	lavalife.com*	Lava Life Inc.	Toronto, CA	12	www.lavalife.com
		Lava Life Inc.	Toronto, CA		www.thenightexchange.com
216.178.176.11	match.com*	Match.com L.P.	TX	11	www.match.com
		Match.com L.P.	TX		www.matchcom.com
		Domains by Proxy	AZ		www.arelia.com
		Match.com L.P.	TX		www.happenmag.com
64.34.113.120	matchmaker.com*	Avalanche, LLC	VA	111	www.matchmaker.com
		Moniker Privacy Services	FL		www.dallasmatchmaker.com
		Moniker Privacy Services	FL		www.catholic-matchmaker.com
64.38.250.155	sexyads.com*	BFH, Ltd.	VA	63	www.sexyads.com
		BFH, Ltd.	St. Johns, AG		www.olderpersonals.com
69.56.167.131	true.com*	HDVE, LLC	TX	15	www.true.com
		H.D. Vest Investigations, Inc.	TX		www.matchmetrics.com
		HDVE, LLC	TX		www.redwhitetrue.com

* Not all domains listed due to significant number.

** Site appears to have a more diverse content; not limited to dating.

*** Site appears to be identified to specific group.

