

Dating Apps and Class Actions: A Match Made in the Courtroom

JANUARY 23, 2017

Tinder touts itself as being “the world’s leading social app for meeting new people. It claims that “with its global reach, people in all 196 countries around the world are swiping right to connect with others, making it a top 10 lifestyle app in more than 70 countries ... Each day, 26 million matches are made on Tinder with more than nine billion matches made to date.” An interesting statistic, considering that the world’s entire population is a shade under 7.5 billion.

While it’s tempting to ponder the implications of these numbers, social anthropology is beyond the scope of this blog, and besides, class action litigation is more interesting. And if you mesh dating apps *and* class actions, the results could be downright scintillating.

Warner v. Tinder, Inc. is not yet scintillating. But given a recent decision of the Eleventh Circuit Court of Appeals, it might one day be.

Here’s Billy Warner’s description of Tinder: Tinder “utilizes a user’s location using the GPS built into their phone, then uses their Facebook information to create a profile. A Tinder profile is made up of a user’s first name, age, photos and any pages they have ‘liked’ on Facebook. Tinder then finds a user potential matches within a nearby geographical radius, and suggests potential matches, which a user has the option to like or pass.” He continues:

Tinder’s primary draw for consumers is a feature known as a “swipe,” which is the act of swiping one’s finger on their smart phone’s touch screen within the Tinder app either left or right, in order to respectively approve or pass on a suggested potential match. If both users swipe right and “like” one another, Tinder will create a direct line of communication between the individuals, and allow them to start messaging one another.

Whatever happened to poetry and a box of chocolates?

In any event, Warner sued Tinder in the Southern District of Florida, claiming that when he downloaded Tinder onto his iPhone in early 2014, Tinder promoted itself as being a “free online dating app.” But then, he contended, Tinder “abruptly began informing consumers on or about March 2, 2015, that consumers would no longer be able to utilize Tinder for the functions which consumers had previously enjoyed free use.” Instead, “consumers that desired to continue using Tinder uninterrupted are required to purchase an account-level subscription of Tinder Plus, at a cost of \$2.99 per month.” And then this:

In fact, Plaintiff learned first of this drastic business model change during the middle of his use of the Tinder App, when a screen popped up on his smart phone’s screen on or about March 5, 2015 and stated “You’re out of likes. Get more likes in 0:00:00. Get unlimited likes with Tinder Plus for \$2.99/mo.”

Warner apparently wanted more swipes. As he explained, “[h]aving unlimited swipes is a necessary requirement for a user to meaningfully use the Tinder app, due in large part to the vast majority of users’ matches being either fake users, escort services, or pornography bots.”

So what did he do? He “reluctantly purchased a monthly subscription plan to the Tinder app, for \$2.99 per month.”

Problem solved? Not according to Warner. Tinder, he alleged, unexpectedly prompted him to pay still more for the Tinder-Plus service “he has previously paid for in full”: specifically, \$19.99 per month. So what did he do? He “subsequently purchased Plus again, and paid \$19.99,” despite “already having paid \$2.99 for this same service, which overlapped with the timing, and function of services already paid for.”

But his purported travails continued. “Despite double-paying for Tinder Plus, once at a rate of \$2.99, and a second time for \$19.99,” he contended that he was “auto-debited \$2.99 by Tinder Plus,” even though he claims he never authorized Tinder “to continue charging him \$2.99 for Tinder Plus.” He had been led to believe, he claimed, that “his subscription to Tinder Plus for \$19.99 superseded his prior purchase of Tinder Plus for \$2.99 per month.” He contended, in other words, that he was being “double-billed for two separate yet identical services.”

Warner’s 147-paragraph amended complaint contained counts against Tinder under the federal Electronic Funds Transfer Act and various Florida statutes. And it sought certification of a class consisting of “[a]ll persons in the state of Florida that downloaded Defendant’s app, Tinder, at any time prior to March 2, 2015,” and of two subclasses.

The Southern District of Florida dismissed with prejudice. Why?

[O]n March 6, 2015, Plaintiff filed a putative class-action complaint in the Central District of California. Therein, Plaintiff similarly alleged that Tinder overcharged its customers. On July 31, 2015, the Court dismissed that case without prejudice to Plaintiff to amend its Complaint within twenty-days in order to cure certain pleading defects. Instead of amending its Complaint, on August 20, 2015, Plaintiff filed a notice of voluntary dismissal without prejudice. Then, on October 9, 2015, Plaintiff re-filed its Complaint in the Southern District of Florida. Under the procedural background of this case, it is clear that the doctrine of first to file and the prohibition against judge shopping applies.

Warner appealed, and on January 17, 2017, the Eleventh Circuit reversed. Although it was “hesitant to conclude from the record on appeal that this action is violative of either the prohibition on judge shopping or the first-filed rule,” that factor didn’t drive its decision. Instead, it reversed “because the sanction of dismissal with prejudice is so unsparing,” and the trial court appeared not to have considered the gamut of possible sanctions at its disposal, if any here were indeed warranted. The appeals chose not to “the ‘extreme sanction’ of dismissal with prejudice absent clear findings that Warner engaged in contumacious conduct and that lesser sanctions would have been insufficient to accomplish the district court’s objective.”

Has love (or like) prevailed? We shall see. The case is *Warner v. Tinder, Inc.*, 11th Circuit Court of Appeal, case no. 10537, 2017 WL 163677, and the decision can be found here: <http://bit.ly/2k1rd4B>.