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Heartbalm Statutes and Deceit Actions

See my interesting client,
Victim of a heartless wile!
See the traitor all defiant
Wear a supercilious smile!

. . . .

Picture, then, my client naming,
And insisting on the day:
Picture him excuses framing
Going from her far away;
Doubly criminal to do so,
For the maid had bought her trousseau! 1

The action for breach of promise to marry is a common law action combining elements of both tort and contract, in which the plaintiff sues the defendant for breaching an agreement between them to marry.2 The action has been severely, and almost uniformly, criticized as being anachronistic, contrary to modern notions of justice, and subject to abuse by blackmail.3 Beginning in 1935, many states enacted

3. See, e.g., A.B. v. C.D., 36 F. Supp. 85, 87 (E.D. Pa.), aff'd per curiam, 123 F.2d 1017 (3d Cir. 1940), cert. denied, 314 U.S. 691 (1941); Pavlicic v. Vogtuberger, 390 Pa. 502, 507-09, 136 A.2d 127, 130 (1957); Stanard v. Bolin, 88 Wash. 2d 614, 617-19, 565 P.2d 94, 96 (1977); H. CLARK, supra note 2, at 3; C. MCCORMICK, supra note 2, at 403-06; Brockelbank, supra note 2, at 13; Feinsinger, supra note 2, at 979; Note, supra note 2, at 212; Comment, supra note 2, at 408; Recent Cases, Breach of Marriage Promise — Statute Outlawing Breach-of-Promise Suits Does Not Bar Action Based on Fraudulent Promise to Marry, 70 HARV. L. REV. 1098, 1099 (1957). It is argued that because contesting a suit on the merits makes a defendant the object of public ridicule and scandal and forces him to expose his fortune to the whims of a jury, most defendants will choose to settle out of court even the most meritless claims. But see Kane, Heart Balm and Public Policy, 5 FORDHAM L. REV. 63, 66-67 (1936). Kane acknowledged the existence of extorted-out-of-court settlements, but remained convinced of the value of the cause of action:

Further considering the matter of extortion or blackmail, we may assume from the declaration of policy contained in Section 61-a of the New York statute that the "grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing" occurred in cases of breach of promise where there was no actual engagement . . . . Only in such cases would the defendant be wholly innocent and free of any wrongdoing. Many practicing lawyers who have prosecuted and defended breach of promise cases, have known of only one wholly innocent defendant, and that one was our dear old plump, respectable friend, Mr. Pickwick, in the action brought against him by the "unimpeachable" Mrs. Bardell, and one must conclude that even he might have been more circumspect.

Id. (emphasis in original). Kane's view is rare. See 1 EARL OF BIRKENHEAD, LAW LIFE AND LETTERS 125-26 (1927) (also defending the action).
sweeping statutes colloquially called "heartbalm" acts\(^4\) that abolished actions for breach of promise to marry and often abolished the related common law actions for alienation of affections, criminal conversation, and seduction as well. Currently, twenty-two states and the District of Columbia have abolished the action by statute,\(^3\) and a few others have limited it.\(^6\) However, no state court of ultimate jurisdiction has abolished the breach of promise to marry suit of its own accord.\(^7\)

Most heartbalm acts are worded very simply\(^8\) and the major ques-

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4. "Heartbalm" statutes are also known as "Heart Balm," "heart-balm" and "Heart-Balm" statutes. The name is a sardonic reference to the broken heart that supposedly justified a breach of promise suit.

5. See ALA. CODE § 6-5-330 (1975); CAL. CIV. CODE § 43.5(d) (Deering 1971); COLO. REV. STAT. § 13-20-202 (1973); CONN. GEN. STAT. ANN. § 52-572(b) (Supp. 1984); FLA. STAT. § 771.01 (1983); IND. CODE § 34-4-4-1 (1976); ME. REV. STAT. ANN. tit. 14, § 854 (1964); MD. CR. & JUD. PROC. CODE ANN. § 5-3-101 (1984); MASS. ANN. LAWS ch. 207, § 47A (Michie/Law Co-op. 1981); MICH. COMP. LAWS ANN. § 600.2901 (West 1968); MONT. CODE ANN. § 27-1-602 (1983); NEV. REV. STAT. § 41.380 (1979); N.H. REV. STAT. ANN. § 508:11 (1983); N.J. STAT. ANN. § 2A:23-1 (West 1952); N.Y. CIV. RIGHTS LAW § 80 (a & b) (McKinney 1976); OHIO REV. CODE ANN. § 2305.29 (Baldwin 1976); PA. STAT. ANN. tit. 48, § 171 (Purdon 1965); VT. STAT. ANN. tit. 15, § 1001 (Supp. 1984); VA. CODE § 8.01-220 (1984); W. VA. CODE § 56-3-2a (Supp. 1984); Wyo. STAT. § 1-23-101 (1977); D.C. CODE ANN. § 16-923 (1981). The rush to enact heartbalm acts slowed by World War II, and since that time only eight states have enacted them, Ohio being the latest in 1975.


7. See, e.g., Bradley v. Somers, 283 S.C. 365, 322 S.E.2d 665, 667 (1984); Menhusen v. Dake, 214 Neb. 450, 451-53, 334 N.W.2d 435, 436 (1983). Instead of abolishing the action, the Washington Supreme Court restricted the damages available from breach of promise actions in Standard v. Bolin, 88 Wash. 2d 614, 565 P.2d 94 (1978). The court's objective was to preserve the action for plaintiffs with a good cause of action while eliminating the sources of its abuse. 88 Wash. 2d at 619, 565 P.2d at 98. See note 100 infra. Cf. Fadgen v. Lenkner, 469 Pa. 272, 365 A.2d 147 (1976) (abolishing common law action for criminal conversation). The breach of promise action is still available today in the majority of states in substantially its common law form, although there is no longer much reported appellate case law. But see Thorpe v. Collins, 245 Ga. 77, 263 S.E.2d 115 (1980); Menhusen v. Dake, 214 Neb. at 450, 334 N.W.2d at 435; Kuhlman v. Cardige, 200 Neb. 150, 262 N.W.2d 454 (1978); Bradley v. Somers, 283 S.C. at 365, 322 S.E.2d at 665; Stanard v. Bolin, 88 Wash. 2d at 614, 565 P.2d at 94. An explanation for the rarity of breach of promise actions today is outside the scope of this Note, but no doubt changed societal mores have contributed to the phenomenon by making breached marriage promises more acceptable to those affected by them and less scandalous to society. See H. CLARK, supra note 2, at 2. Nevertheless, in states without heartbalm acts, the danger remains that the abuse of the breach of promise action that was so prevalent in the early part of this century could return. Courts in these states should follow the lead of the Washington Supreme Court in Stanard v. Bolin, 88 Wash. 2d at 614, 565 P.2d at 94, and eliminate the aspects of the action (particularly expectancy damages and limited defenses) that are most prone to attract abuse. Commentators, too, have suggested ways to eliminate abuses of the action, either by statutes less restrictive than the heartbalm acts, or by court action. See, e.g., Brockelbank, supra note 2, at 209-12; Feinsinger, supra note 2, at 985.

8. See H. CLARK, supra note 2, at 16. For example, the California statute states: "No cause of action arises for . . . [b]reach of promise of marriage." CAL. CIV. CODE. § 43.5(d), at 187 (Deering 1971). The New York law abolishes rights of action . . . for . . . breach of contract to marry. . . . No contract to marry made
tion of interpretation has been whether the statutes bar all suits involving a marriage promise or whether they bar breach of promise to marry suits but allow other actions based on traditional common law and equity. It is settled that most suits in restitution are outside the statutory bar. Courts disagree, however, on whether a party may recover damages for injury from a willful, fraudulent marriage promise. Fearful of the reintroduction of the abuses associated with

or entered into in this state shall operate to give rise, either within or without this state, to any cause or right of action for its breach.

N.Y. CIV. RIGHTS LAW § 80-a, at 250 (1976).


Deceit actions for fraudulent inducement to enter a sham, void, or illegal marriage have been allowed in two states. See Morris v. MacNab, 25 N.J. 271, 135 A.2d 657 (1957); Tuck v. Tuck, 14 N.Y.S.2d 341, 251 N.Y.S.2d 653, 200 N.E.2d 554 (1964); Amsterdam v. Amsterdam, 56 N.Y.S.2d 19 (1945); Snyder v. Snyder, 172 Misc. 204, 14 N.Y.S.2d 815 (1939); Cf. In re Marriage of Buckley, 133 Cal. App. 3d 927, 184 Cal. Rptr. 290 (1982).

Claims were rejected in a Massachusetts suit for assault and battery because of fraudulent inducement to submit to caresses, Thibault v. Lalumiere, 318 Mass. 72, 60 N.E.2d 349 (1945), and in two suits for intentional infliction of mental distress, Waddell v. Briggs, 381 A.2d 1132 (Me. 1978); Roy v. Hartog, 81 Misc. 2d 350, 366 N.Y.S.2d 297 (N.Y.C. Civ. Ct. 1975).
breach of promise to marry actions, many courts and commentators have interpreted the heartbalm statutes to bar suits in deceit on a fraudulent marriage promise. Under this dominant interpretation, one who has been defrauded into expending great sums of money, changing jobs, selling a house, or undertaking any other expense in reliance on a false marriage promise cannot recover, and consequently the fraudfeasor can act with impunity. The state has an interest in giving these victims of fraud a remedy in the courts and in further preventing such acts by the fraudfeasor as long as greater evils do not follow from allowing the action.

This Note considers whether actions in deceit based on fraudulent marriage promises should be deemed barred by the heartbalm statutes. It determines that they should not. Part I examines the policies and arguments against the common law breach of promise to marry action that are embodied in the heartbalm statutes and looks at the limits courts have placed on the reach of the statutes. Part II re-examines the deceit action in light of the purposes of the heartbalm acts and their intended scope, as well as in light of criticism of the action by the courts and commentators. In particular, Part II focuses on limiting damages under the deceit action and curbing its potential for abuse. If the action is properly circumscribed, it can provide a needed remedy without disturbing the policies that underlie the heartbalm acts.

I. THE HEARTBALM STATUTES

A. Underlying Policies of the Statutes

Three principal reasons have traditionally been cited for the enactment of the heartbalm statutes. The first is that the breach of prom-

11. The action brought in deceit for a fraudulent marriage promise has been rather routinely criticized by courts and commentators as being nothing more than a device used by the plaintiff to avoid the statute by relabeling an ordinary breach of promise suit. See notes 53-55 infra and accompanying text.

12. See notes 47-60 infra and accompanying text.

13. See Pavlicic v. Vogtsberger, 390 Pa. 502, 136 A.2d 127 (1957), where a young woman continually wheedled more and more money and gifts out of an old man based on her promise of marriage until she finally got enough money to head for a distant town, buy a bar, and marry another man more her age. See also Lambert v. State, 73 Wis. 2d 590, 243 N.W.2d 524 (1976), where a man offered marriage to seven women in three years and the women incurred wedding expenses, sold their homes, or obligated themselves for other expenses in reliance on his fraud. Lambert was convicted under a criminal fraud statute.

14. See note 115 infra and accompanying text.

15. The common law breach of promise to marry action is of ancient origins. See the brief histories of the action set out by H. CLARK, supra note 2, at 1-2; Brockelbank, supra note 2, at 2-4. Criticism of the action reached its peak during a period beginning around the turn of the century and ending with World War II, a period corresponding to a dramatic rise in the number of reported cases and estimated out-of-court settlements. See note 28 infra. Criticism gradually died out as the heartbalm statutes were enacted. A second flurry of criticism corresponded with the judgment in an important California case, Langley v. Schumacker, 46 Cal. 2d 601, 297 P.2d 977 (1956), which distinguished deceit actions as lying outside the state's statute. See, e.g., Note, supra note 2; Comment, supra note 2; Recent Cases, supra note 3. These later critics adopted
ise action results in excessive damage verdicts, far out of line with the injury claimed, that contribute to lurid publicity for both defendants and the courts.\textsuperscript{16} Courts and commentators have found that the excessive verdicts are the result of a combination of the types of damages recoverable under the action\textsuperscript{17} and the fact that too sentimental juries are given wide discretion in setting damages.\textsuperscript{18}

Under the typical breach of promise action still available today in a majority of states, plaintiffs may sue to recover for a large assortment of tort and contract damages: out-of-pocket expenses, personal injuries such as mental and emotional suffering and illness, damage to reputation, humiliation, embarrassment, "loss of worldly advantage" (expectation of sharing defendant's wealth, social position, home, and other marital incidents), and punitive damages.\textsuperscript{19} Because evidence of many of the earlier assumptions about the potential for abuse. Consequently, most of the criticism of the breach of promise and deceit actions is based on social circumstances and attitudes that may no longer be present. It should not be adopted today without reflection.

Although criticism of breach of promise actions has been almost uniform, commentators have not uniformly praised the heartbalm statutes. Many have asserted that the acts are too broad and may unnecessarily bar legitimate suits in situations in which society has an interest in providing a remedy. See C. McCormick, supra note 2, at 405; Feinsinger, supra note 2, at 66; cf. Kane, supra note 3 (vehemently defending the breach of promise action).


One source of the excessive smorgasbord of damages may be the dual tort/contract character of the breach of promise action, a result of the action's peculiar development from both tort and contract antecedents in the common law. See H. Clark, supra note 2, at 12; Brockelbank, supra note 2, at 4-6, 11-12; Feinsinger, supra note 2, at 983 & n.26. For an illuminating and amusing description of the bargained-for transactional nature of engagements in eighteenth and nineteenth century America, see G. Howard, 2 A History of Matrimonial Institutions 200-09 (1904). It is clear in Howard's description of New England courtships and engagements that an engagement was considered to be essentially a contract for transfer of property. Yet, at present, the action for breaking that engagement is viewed by the public much more as one for tort-like harm. See, e.g., Turano, supra note 16; see also H. Clark, supra note 2, at 2; Brockelbank, supra note 2, at 2-4.

18. See Stanard v. Bolin, 88 Wash. 2d 614, 618, 565 P.2d 94, 96 (1977); H. Clark, supra note 2, at 12; C. McCormick, supra note 2, at 398; Brockelbank, supra note 2, at 10; Feinsinger, supra note 2, at 981, 983 n.26; Comment, supra note 2, at 408.


And, first, she is entitled to damages as compensatory damages for loss of time; for any expense she may have been put to in making preparations for marriage; for mental suffering
defendant's wealth is also usually admitted, the potential for excessive jury verdicts is manifestly very great. In addition, because the action generally gives the jury almost unbridled discretion to calculate a remedy, commentators have argued that it encourages the jurors to vent their moral indignation and to express their emotional sympathy with the plaintiff in the form of higher damages. Furthermore, charges in the scholarly and popular press at the height of the period of public criticism of the action maintained that jurors were using improper considerations for determining the amount of judgments, such as the beauty of the plaintiff.

which may have been occasioned by the breaking off of the contract; for injury to her health, if any; for loss of a permanent home, and the worldly advantage which might have been derived therefrom by her — the circumstances as to home, property, and pecuniary condition of the defendant being considered from the evidence in the case, and her own lack of independent means, if established. She is entitled to damages to her reputation, if any, either moral or physical; for injury to her future prospects of marriage. She is entitled to damages for any humiliation, contempt, or mortification she may have suffered in the circles wherein she moved by reason of the breach of the contract upon defendant's part.

20. In a breach of promise action, this evidence may be admitted to show what the plaintiff's standard of living would have been if the defendant had married him, and thus what measure of worldly advantage was lost. It is also admitted to calculate punitive damages. See H. CLARK, supra note 2, at 12; C. McCORMICK, supra note 2, at 399; Feinsinger, supra note 2, at 984.

21. "The recognition of ['worldly advantage' as a] basis of recovery opens the door to proof of the defendant's wealth, which it is believed usually has a more potent effect upon the size of the verdict than any doctrinal instruction about damages." C. McCORMICK, supra note 2, at 399 (footnote omitted). See also H. CLARK, supra note 2, at 14-15; Brockelbank, supra note 2, at 11; Feinsinger, supra note 2, at 983.

An example of a typically scandalous case from the heyday of the action is O'Brien v. Manning, 101 Misc. 123, 166 N.Y.S. 760 (N.Y. Sup. Ct. 1917). There the plaintiff was 29 and the defendant 84. The defendant's wealth was said to be between $15,000,000 and $20,000,000. The engagement was very brief and only wounded pride and loss of worldly benefits were claimed as damages. Because the defendant made some false charges against the plaintiff's reputation in his answer the judge also instructed the jury on exemplary damages. The verdict was for $200,000 compensatory and $25,000 exemplary damages. The supreme court reduced the total verdict to $125,000.

22. Much to the regret of the commentators, the courts have been reluctant to overturn jury verdicts or reduce judgments. See Brown, Breach of Promise Suits, 77 U. PA. L. REV. & AM. REG. 474, 493 (1929); C. McCORMICK, supra note 2, at 403; Comment, supra note 2, at 408. Several states have directed by law that damages in breach of promise actions should be completely within the discretion of the jury. See, e.g., MONT. REV. CODES ANN. § 8685 (1935); N.D. COMP. LAWS ANN. § 7164 (1913); OKLA. STAT. tit. 23, § 40 (1941); S.D. CODE § 37.1810 (1939).

23. See Feinsinger, supra note 16, at 417: Excessive verdicts are a possible danger in any action in which the jury is permitted to compensate for wounded feelings or to award exemplary damages. But the actions in question are unique in their connotation of sexual misconduct, interference with familial relations, and disregard for accepted canons of social propriety. This factor aggravates the usual tendency of juries to overcompensate for injured feelings and leads them to express their emotional sympathy and moral indignation in the guise of exemplary damages. In this expression juries are encouraged rather than checked by trial and appellate courts. See also H. CLARK, supra note 2, at 12; Comment, supra note 2, at 408.

24. See Brockelbank, supra note 2, at 10 ("[T]he average jury, proverbially generous with the money of other people, recognizes only two bases of computation, i.e., the plaintiff's beauty and the defendant's ability to pay.") (quoting Wright, supra note 16, at 374); ("If the girl be pretty, the jury generally give her heavy damages; if she be unattractive, they often have a sneaking sympathy with the man") (quoting White, Breach of Promise of Marriage, 10 LAW Q. REV. 134,
The second reason cited for the enactment of the heartbalm acts is that men's fears of excessive verdicts and of the scandal surrounding breach of promise suits prompted women to bring or threaten to bring unfounded suits and thereby extort large out-of-court settlements. In fact, some of the heartbalm acts state plainly that abuse by unscrupulous people filing meritless claims was the most important reason for enacting the statute. At the time many of the acts were

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141 (1894)). See also Brockelbank, supra note 2, at 12; Feinsinger, supra note 2, at 983; Turano, supra note 16, for a popular view of the abuses surrounding these actions in the 1930s.

Because such a wide spectrum of damages was allowable and evidence of defendant's wealth was admissible, defendants generally chose to settle suits rather than gamble on the damages a jury might assess after getting a peek into the defendant's wallet. And because there were no adequate defenses to the action, see note 32 infra, and since it was believed that jurors decided damages on factors no more rational than the beauty of the plaintiff and the wealth of the defendant, defendants were justifiably terrified of being at the mercy of such a decision maker.

25. There are virtually no reported cases of men suing for breach of promise to marry although it appears that in colonial times men and women both brought the action in courts of law. See G. Howard, supra note 17, at 200-09. In fact, a nineteenth century state high court noted that, practically speaking and with "just regard to public morals," only women could sue for breach of promise. Kelly v. Renfro, 9 Ala. 325, 328 (1846). Such a rule would undoubtedly be unconstitutional today after Orr v. Orr, 440 U.S. 268 (1979). Most commentators have also assumed that the action is one exclusively for women:

There is no reason in law why a man cannot sue when his fiancee jilts him, but men are so plainly incapable of assuming the air of wronged innocence which the role of plaintiff in breach of promise suits requires that they seldom do bring an action. Inherited notions of chivalry still put limits to the equality of the sexes.

H. Clark, supra note 2, at 5 (citations omitted). See also Brockelbank, supra note 2, at 200. Hollywood did try out the theme, though, in the movie Love Among the Ruins.

Men have been plaintiffs in several of the reported actions brought on collateral common law rights. See, e.g., Norman v. Burk, 93 Cal. App. 2d 687, 209 P.2d 815 (1949); Perthus v. Paul, 81 Ga. App. 133, 58 S.E.2d 190 (1950); Harsche v. Czyz, 157 Neb. 699, 61 N.W.2d 265 (1953) (the fact that the plaintiff was a man may explain why he chose to sue in fraud and not in breach of promise even though Nebraska had no heartbalm statute); Pavlicic v. Vogtsberger, 390 Pa. 502, 136 A.2d 127 (1957). Perhaps one of the major reasons courts were not concerned with whether or not the plaintiffs in these cases were really unscrupulous was that the courts could not imagine that men would bring scurrilous or unfounded suits. The fact that a man was suing also may have emphasized the difference between the suit before the court in restitution or deceit and the banned breach of promise action.

26. See authorities cited in note 3 supra.


The remedies provided by law . . . for the enforcement of actions based upon alleged alienation of affections, criminal conversation, and breach of contract to marry have been subjected to grave abuses, caused extreme annoyance, embarrassment, humiliation, and pecuniary damage to many persons wholly innocent and free of any wrongdoing who were merely the victims of circumstances, and have been exercised by unscrupulous persons for their unjust enrichment, and have furnished vehicles for the commission or attempted commission of crime and in many cases have resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by the abolition thereof. Consequently, in the public interest, the necessity for the enactment of this [article] is hereby declared as a matter of legislative determination.

See also N.Y. Civ. Rights Law § 80(a) (McKinney 1976); The Outlawry of Heart-balm Suits, Literary Dig., Apr. 13, 1935, at 22 (statements made by New York Governor Lehman upon signing New York's heartbalm act).

As one court stated, "the action . . . had been so misemployed . . . that the evil of abuse exceeded to such an extent the occasional legitimate benefit conferred by a breach of promise suit that good government dictated its abolition." Pavlicic v. Vogtsberger, 390 Pa. 502, 509, 136 A.2d 127, 131 (1957).
introduced, threats of frivolous suits were being used as instruments of blackmail or as a way of coercing marriages no longer desired by both parties. Because courts and juries invariably implied a marriage promise simply from evidence of association between the man and woman, and since no corroborating testimony was necessary to maintain the action, clever plaintiffs could easily put together the necessary elements of a suit. Proof of sexual intercourse between the parties was invariably dispositive of the existence of a promise to marry. Furthermore, there were virtually no adequate defenses to the action, and in fact if a defense was pleaded but not believed it often was grounds for aggravated damages.

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28. The overriding objection to the breach-of-promise action is not that recovery may be obtained, but that the threat of a groundless or frivolous suit may be used as an instrument of blackmail or as a means of coercing a marriage no longer mutually desired by the parties to the contract. Recent Cases, supra note 3, at 1099 (citing C. Vernier, 1 American Family Laws § 6 (1931)).

The legislation was made necessary because of the widespread abuse of the vehicle of a breach of promise suit to compel overly-apprehensive and naive defendants into making settlements in order to avoid the embarrassing and lurid notoriety which accompanied litigation of that character. The legislation was intended to ward off injustices and incongruities which often occurred when, by the mere filing of breach of promise suits innocent defendants became unregenerate scoundrels and tarnished plaintiffs became paragons of lofty sensibility and moral impeccability. It was not unusual in threatened breach of promise suits that the defendant preferred to buy his peace through a monetary settlement rather than be vindicated by a trial which might leave his good name in shreds. Pavlicic v. Vogtsberger, 390 Pa. 502, 508-09, 136 A.2d 127, 130 (1957). The problem of blackmail by the threat of a breach of promise action was especially acute where there was evidence of sexual intercourse. See Feinsinger, supra note 2, at 981; see also H. Clark, supra note 2, at 3.

One publication claimed in 1935 that "it was estimated by some of those 'in the know' on Broadway that 'female racketeers' extort annually approximately $10,000,000 from men blanished into promises they soon regret." The Outlawry of Heart-balm Suits, supra note 27, at 22.

29. See H. Clark, supra note 2, at 3; Feinsinger, supra note 2, at 981 n.12. In England, where corroboration of testimony in breach of promise to marry actions is necessary, there are few such suits. This was not true before corroboration was required by statute. See C. McCormick, supra note 2, at 405 & n.58.

30. Often the actions involved young women allegedly "spurned" by 80-year-old men of great wealth. See the facts of O'Brien v. Manning set out in note 21 supra. Other times, a woman scorned may have discovered that her companion was married and sought to use that fact and her fear of publicity to her advantage. See generally, A.B. v. C.D., 36 F. Supp. 85 (E.D. Pa.), affd. per curiam, 123 F.2d 1017 (3d Cir. 1940), cert. denied, 314 U.S. 691 (1941); Kane, supra note 3, at 64.

31. See H. Clark, supra note 2, at 3; Feinsinger, supra note 2, at 981. For a measure of how far attitudes may have changed, see McGregor v. Turner, 205 Kan. 386, 386-87, 469 P.2d 324, 326-27 (1970), where the lower court found insufficient evidence to support a claim of breach of promise to marry even though a paternity claim was joined to the suit.

32. See C. McCormick, supra note 2, at 402-03. McCormick described defendant's privilege to show plaintiff's demerits in mitigation of damages, or as a defense, as "dangerous" because such evidence impugns the plaintiff's person, reputation, or character. If the jury was not convinced of the truth of the defenses, the fact that the defendant had tried to soil the plaintiff's reputation would induce the jurors to prescribe even heavier aggravated or punitive damages. See also O'Brien v. Manning, 101 Misc. 123, 127, 166 N.Y.S. 760, 762-63 (N.Y. Sup. Ct. 1917); Feinsinger, supra note 2, at 982-83.

According to Brockelbank, successful defenses generally relate to the "condition of the flesh" bargained for. Moral, spiritual, or emotional reasons for cancelling the marriage are not good defenses. This reasoning underlines the fact that courts in breach of promise suits have treated
The third reason cited for the enactment of the heartbalm acts is that society has so changed that being a victim of a breached marriage promise is no longer viewed as an injury sufficiently deserving of judicial remedy.\textsuperscript{33} Courts and commentators have recognized that marriage is no longer considered to be primarily a property transaction,\textsuperscript{34} but has come to be seen as a union of love.\textsuperscript{35} Engagements are now viewed as important trial periods when couples can determine if they do indeed want to commit their lives to each other, and during which the freedom to decline marriage without sanction is essential.\textsuperscript{36} Enforcing marriage promises destroys the social utility of this trial period, making it "as expensive to get engaged as it is to get married."\textsuperscript{37}

The derisive term "heartbalm" attached to the breach of promise action is an indication that public policy no longer considers money damages appropriate for what is perceived as only an ordinary broken heart.\textsuperscript{38}
B. Limits on the Heartbalm Acts

Some suits based on common law rights distinct from the breach of promise to marry have been upheld in the courts as being outside the prohibition of the heartbalm acts despite the fact that they are based on breach of promise to marry facts. Suits to recover engagement rings, other engagement presents, and property transferred on condition of marriage have been nearly unanimously permitted even though such suits depend upon proof of a breach of a marriage promise. Suits in deceit to recover damages for being fraudulently induced to enter a sham, void, or illegal marriage have also been maintained in two states.

The courts have found three factors important in deciding whether certain suits fall outside the statutory bar. The first factor is that the action should not be based on the actual breach of promise to marry, but should rely instead upon other, distinct common law rights. The second factor is that the action should not be subject to abuse by unscrupulous plaintiffs hoping to extort settlements out of defendants fearful of enormous jury verdicts. While several factors contribute

39. See notes 8-9 supra and accompanying text. Courts have permitted some actions related to the breach of promise to marry suits to go forward, but they have prohibited deceit actions because of a fear that damages for wounded feelings and other emotional injuries might be permitted in deceit. See Langley v. Schumacker, 46 Cal. 2d 601, 604-05, 297 P.2d 977, 980 (1956) (Spence, J., dissenting); Piccininni v. Hajes, 180 Conn. 369, 374-75, 429 A.2d 886, 889 (1980) (Peters, J., dissenting); H. CLARK, supra note 2, at 17 n.16; Comment, supra note 2, at 409-10. The elimination of such damages has been understood as one of the major purposes of the heartbalm acts. See Piccininni v. Hajes, 180 Conn. 369, 374-75, 429 A.2d 886, 889 (1980) (Peters, J., dissenting); Feinsinger, supra note 2, at 979, 985; Comment, supra note 2, at 409 (1957).

Courts have also explained their rejection of deceit actions as arising from the fact that since the breach of promise action has both tort and contract characteristics, it is unlikely that a legislature would have intended to prohibit the contract action and not the tort. See notes 53-55 supra and accompanying text.

40. See cases cited in note 9 supra.

41. See cases cited in note 9 supra.


43. See Pavlicic v. Vogtsberger, 390 Pa. 502, 508-09, 136 A.2d 127, 131 (1957); Waddell v. Briggs, 381 A.2d 1132, 1136-37 (Me. 1978); H. CLARK, supra note 2, at 18; Comment, supra note 2, at 410.
to that abuse, the primary cause, excessive damages, is usually not present if the allowable damages are easily quantifiable and are limited to actual and demonstrable pecuniary loss. The third factor cited for granting exceptions to the statutes is the more general policy consideration that courts must not permit perpetrators of fraud to use the heartbalm statutes (which were enacted to prevent fraud) to immunize their wrongful actions.

C. The Deceit Action on a Fraudulent Marriage Promise as Barred by the Heartbalm Statutes

Deceit actions for damages stemming from a fraudulent promise to marry have generally been included in the bar of the heartbalm acts. A few courts, though, have found that deceit actions are outside the statute because they are distinct causes of action from breach of promise to marry, and because wrongdoers should not have their fraud

44. See notes 23-24 supra and accompanying text (sentimental juries); notes 29-31 supra and accompanying text (light burden of proof); note 32 supra and accompanying text (inadequate defenses).


In cases involving fraudulent inducement to enter into a sham, void, or illegal, marriage the allowable damages are not as easily quantifiable as in a restitution suit. See, e.g., Morris v. MacNab, 25 N.J. 271, 280-81, 135 A.2d 657, 662 (1957). However other considerations, such as the fact that there must be proof that a wedding ceremony actually occurred, guarantee that the claims will be genuine and not brought merely to extort a settlement. See generally Snyder v. Snyder, 172 Misc. 204, 204-05, 14 N.Y.S.2d 815, 816 (1939).

46. See Tuck v. Tuck, 14 N.Y.2d 341, 346, 200 N.E.2d 554, 557, 251 N.Y.S.2d 653, 657 (1964) ("A statute designed to prevent fraud should not unnecessarily be extended by construction to assist in the perpetration of a fraud."). See also Snyder v. Snyder, 172 Misc. 204, 204-05, 14 N.Y.S.2d 815, 816 (1939); Pavlicic v. Vogtsberger, 390 Pa. 502, 508-09, 136 A.2d 127, 130 (1957); Brockelbank, supra note 2, at 209.

47. See Tuck v. Tuck, 14 N.Y.2d 341, 346, 200 N.E.2d 554, 557, 251 N.Y.S.2d 653, 657 (1964) ("A statute designed to prevent fraud should not unnecessarily be extended by construction to assist in the perpetration of a fraud."). See also Snyder v. Snyder, 172 Misc. 204, 204-05, 14 N.Y.S.2d 815, 816 (1939); Pavlicic v. Vogtsberger, 390 Pa. 502, 508-09, 136 A.2d 127, 130 (1957); Brockelbank, supra note 2, at 209.

48. See Boyd v. Boyd, 228 Cal. App. 2d 374, 380-82, 39 Cal. Rptr. 400, 405 (1964); Waddell v. Briggs, 381 A.2d 1132, 1135 (Me. 1978) (heartbalm statute shows a vigorous legislative policy which should not be sapped by refined distinctions shaped to fit hardship cases).

It is relevant to the states' interest in providing a remedy for deceit that no court of ultimate jurisdiction has ever abolished breach of promise to marry of its own accord, and that most state legislatures still permit breach of promise actions. See note 7 supra. The benefits even of the traditional breach of promise action are deemed substantial in those states. The abuses there do not seem to have been grave enough to outweigh the benefits of the action. Even more interesting is the Washington Supreme Court's decision to limit the perceived sources of abuse of the breach of promise action instead of abolishing the action altogether. See Stanard v. Bolin, 88 Wash. 2d 614, 565 P.2d 94 (1977).

49. See note 10 supra and accompanying text. However, the law is by no means settled; most states with heartbalm acts have not yet faced the question.

immunized from suit by the heartbalm act designed to prevent fraud. Notwithstanding these rationales, two of the cases have been severely criticized, one has been overturned by statute, and the precedential value of another is in doubt.

The principal reason stated for barring deceit actions under the heartbalm statutes is that suits in deceit for fraudulent promises to marry would allow unscrupulous plaintiffs to circumvent the heartbalm statute's ban on breach of promise suits by merely changing the pleadings. Courts are concerned that even enabling the plaintiff to frame a complaint and get into court on breach-of-promise-type facts, regardless of the chances of success, will cause publicity-shy defendants to settle out of court without contesting the suit on its merits. This would frustrate the very purpose of the heartbalm acts.

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52. Perthus v. Paul, 81 Ga. App. 133, 58 S.E.2d 190 (1950), involved a plaintiff worried about a choice of laws question between Georgia (which had no heartbalm act) and Massachusetts (which had a heartbalm act that was apparently interpreted very restrictively at the time following dictum in Thibault v. Lalumiere, 318 Mass. 72, 60 N.E.2d 349 (1945)). The plaintiff chose to sue in deceit instead of breach of promise to avoid the chance of having his action barred if Massachusetts law were deemed applicable. Thorpe v. Collins, 245 Ga. 77, 79, 263 S.E.2d 115, 117 (1980) distinguished Perthus v. Paul on the curious ground that the plaintiff in Perthus "had a claim for breach of promise" in Georgia (emphasis added). The more obvious ground for distinguishing the cases was the actual holding of Thorpe v. Collins, namely that the plaintiff knew the defendant was married and Georgia public policy does not permit reliance on a marriage promise which the promisee knew could not be fulfilled. In effect, there was no fraud. See Thorpe v. Collins, 245 Ga. at 79, 263 S.E.2d at 117.


In Boyd v. Boyd, 228 Cal. App. 2d 374, 376-77, 39 Cal. Rptr. 400, 402 (1964), the California Court of Appeals indicated that the plaintiff in Langley v. Schumacker, 46 Cal. 2d 601, 297 P.2d 977 (1956), amended her complaint several times before she was able to state a cause of action that avoided the bar of the heartbalm acts.


In Waddell v. Briggs, 381 A.2d 1132, 1135-36 (Me. 1978), the court dismissed a suit brought for intentional infliction of emotional distress, equating the problems of out-of-court settlement with those of a tort suit in fraud. Although the cause of action for intentional infliction of emo-
which is to halt abuses of this kind. A second reason cited for interpreting the heartbalm acts to prohibit deceit actions is a fear that damages for wounded feelings and other emotional injuries might be permitted under the actions. The elimination of such damages has been understood to be another of the major purposes of the heartbalm acts. A third reason courts have cited for rejecting deceit actions is that because the breach of promise action has both tort and contract characteristics, it is unlikely the legislature would have intended only to prohibit the contract action and not the tort.

55. Courts have responded to the fear of the abuses of the breach of promise action from the days of Sulkowski v. Szewczyk, 255 A. D. 103, 6 N.Y.S.2d 97 (N.Y. App. Div. 1938), when the court was very familiar with the abuses connected with the action, until the present in opinions such as Piccininni v. Hajus, 180 Conn. 369, 429 A.2d 886, 889 (1980) (Peters, J., dissenting), in which the court heard its first challenge to the state's heartbalm statute since its enactment in 1967. The dissenting judges relied on statements of the potential for abuse of deceit actions made by courts and commentators from a different era and made no attempt to place them in modern context. See Piccininni, 180 Conn. at 375, 429 A.2d at 889.

The fear of abuse was acute in the older cases. This is particularly clear in A.B. v. C.D., 36 F. Supp. 85, 87 (E.D. Pa.), aff'd per curiam, 123 F.2d 1017 (3d Cir. 1940), cert. denied, 314 U.S. 691 (1941), where the court brushed aside the plaintiff's claim that the action was not brought on a valid contract but in deceit on fraud. It said that the suit was "essentially a sort in which the service of the summons or merely the threat to do so is sufficient to cause a settlement even when there is not any merit to the alleged cause of action." In fact, the pleadings consisted of matters so scandalous that the court had them impounded, directed that the names of the parties not be mentioned, and captioned the suit "A.B. v. C.D." 36 F. Supp. at 88. The case involved a young woman in her twenties suing a rich man much older than she. As such it was indeed the classic situation of abuse the statutes were designed to abolish.

In Sulkowski v. Szewczyk, 255 A.D. 103, 6 N.Y.S.2d 97 (N.Y. App. Div. 1938), the court stated that "[p]laintiff's suit is one of those in which the service of the summons or merely the threat to do so is sufficient to cause a settlement even when there is not any merit in the alleged cause of action." See also Waddell v. Briggs, 381 A.2d 1132, 1135 (Me. 1978); H. Clark, supra note 2, at 16-17, 20; Brockelbank, supra note 2, at 13-15; Feinsinger, supra note 2, at 979; Comment, supra note 2, at 408, 410; notes 27 & 53-54 supra.


57. See Piccininni v. Hajus, 180 Conn. 369, 429 A.2d 886, 889 (1980) (Peters, J., dissenting opinion); Feinsinger, supra note 2, at 979, 985; Comment, supra note 2, at 409.

58. See Langley v. Schumacker, 46 Cal. 2d 601, 604-05, 297 P.2d 977, 980 (1956) (Spence, J., dissenting); Note, supra note 2, at 212-13 (1957); Recent Cases, supra note 3, at 1099; Comment, supra note 2, at 407 & n.7 (1957); cf. Waddell v. Briggs, 381 A.2d 1132, 1134 (Me. 1978) (with regard to the tort of intentional infliction of emotional distress). See also Thorpe v. Collins, 245 Ga. 77, 79, 263 S.E.2d 115, 117 (1980): "[The plaintiff] may not in tort gain access to the courts where she may not in contract." This does not appear to be the rule in a majority of the states. See notes 64-66 infra and accompanying text.

This argument has a superficial appeal because both breach of promise to marry and deceit actions contain aspects of tort and contract. See notes 2 supra & 61 infra and accompanying text. But simply to state that a legislature intended to bar deceit actions because it intended to bar the tort aspects of breach of promise as well as the contract ones ignores significant differences between the two actions and exalts denomination over substance. The tort aspects of the two actions are not the same. The tort aspects of breach of promise go to the personal wrong in-
Courts that have concluded that deceit actions are barred by the heartbalm statutes have given inadequate consideration to the factors used to justify exceptions to the statute. Only the danger of abuse has been explicitly considered and even this consideration has been narrow. Courts have focused principally only on the attraction to unscrupulous people of the potential damages allowable in deceit and on the ease of drafting a complaint in deceit, not on the likelihood of success or on the modern attitudes toward such suits and toward fears of scandal. This Note reconsiders whether deceit actions on a fraudulent marriage promise should be deemed barred by the heartbalm statutes by examining the practical and theoretical character of the action in light of all the policies behind the statutes, the reasons for limits already placed on the laws, and the reasons advanced both for and against allowing deceit actions.

II. DECEIT ACTIONS ON A FRAUDULENT MARRIAGE PROMISE RECONSIDERED

A. The Deceit Action as a Distinct Cause of Action from Breach of Promise

Although there is a certain confusion surrounding the distinction between the common law action of deceit and its near neighbors in warranty, negligence, strict liability, and breach of contract, deceit is recognized as a distinct cause of action. It is distinguished by the requirement of fraud, and the necessity of showing that the defendant knew of the falsity of his statement and that he had the intention to
mislead the plaintiff.62

The enforceability at contract law of the fraudulent promise or statement on which deceit is based63 is usually of no consequence in determining whether an action in deceit lies.64 According to Dean Prosser:

The prevailing view . . . permits the action [in deceit] to be maintained, considering that the policy which invalidates the promise is not directed at cases of dishonesty in making it . . . . [T]he tendency is clearly to treat the misrepresentation action as a separate matter from the contract.65

In like manner, a statute denying recovery for the breach of contract or promise also does not generally affect the availability of the action in fraud.66 Thus, under common principles of tort law, deceit on a fraudulent promise to marry is a cause of action distinct from the breach of promise to marry action and is not necessarily barred by the heartbalm statutes.67

62. See W. Prosser, supra note 61, at 684, 701; James & Gray, supra note 49, at 508 n.24. An action charging fraud demands that the trier of fact determine the state of the defendant's mind at the time he made his promise to marry. The test of the defendant's intent is also called the "scienter" requirement. The state of the defendant's mind, moreover, is a "fact," and must be shown to exist by clear and convincing evidence. See Edgington v. Fitzmaurice, 29 Ch. D. 459, 483 (Ch. App. 1885); James & Gray, supra note 49, at 501; Restatement (Second) of Contracts § 171 comment a (1981); see also Restatement (Second) of Torts § 525 (1977), quoted in note 61 supra.

Restatement (Second) of Contracts § 162 comment a (1981) defines fraud to include both the consciousness that the promise is false and the intent to mislead with that false promise. Restatement (Second) of Torts § 526 (1977) defines fraud more narrowly, to encompass only the knowledge of making a false statement. Nevertheless, the intent to mislead another with the knowingly false statement is still an element of the tort of misrepresentation. Restatement (Second) of Torts § 531 (1977). Restatement (Second) of Torts merely separates these elements traditionally considered as a unit.

63. A fraudulent oral promise is also actionable. See James & Gray, supra note 49, at 506-07.

64. See James & Gray, supra note 49, at 302. The Restatement (First) of Contracts § 473 comment d (1932) stated that unenforceable contracts could not be sued on in fraud, but Restatement (Second) of Contracts § 171 comment b (1981) has eliminated that rule to make the enforceability of the underlying promise irrelevant to the action in fraud. See also Restatement (Second) of Torts § 530 comment e (1977). An argument against allowing deceit actions on a fraudulent marriage promise based on § 473 comment d of the Restatement (First) of Contracts was made in Note, supra note 2, at 211.

65. W. Prosser, supra note 61, at 730.

66. See James & Gray, supra note 49, at 302.


The defendant argues that there would be no basis for the present action had there not been a promise of marriage by the decedent and a failure to keep such promise, and that therefore the plaintiff's cause of action is based upon a breach of contract to marry. I do not go along with this contention. The plaintiff does not here assert that the decedent wronged her in failing to marry her; rather, she is asserting that decedent wronged her in fraudulently inducing her to marry him. The plaintiff's complaint is based on what the decedent did, and not on what he refused to do. But see A.B. v. C.D., 36 F. Supp. 85, 87 (E.D. Pa. 1940), aff'd per curiam, 123 F.2d 1017 (3d Cir.), cert. denied, 314 U.S. 691 (1941): The legislatures did not intend that courts should explore the minds of suitors and deter-
The confusion that surrounds deceit actions and makes them sometimes difficult to distinguish from other actions on the same underlying facts centers on the notion of fraud. There is a tendency for the standard of intent (scienter) required to state a cause of action in deceit to vary from conscious deception (true fraud) to negligence and strict liability.\(^6\) Because defendant’s state of mind may always be inferred from the circumstances under which a statement is made, there is a certain leeway for courts to hold a defendant to a “reasonable” standard of judgment as to the truth of his statement, regardless of his good faith belief in its truth.\(^6\) Furthermore, in some situations, courts have held the defendant to a type of strict liability standard by making a presumption that he knows the truth or falsity of his statements.\(^7\) As a result, the line drawn between intent to deceive and the lack thereof can become quite obscured.\(^7\) When this happens, the deceit action, theoretically based on fraud, can become virtually indistinguishable from ordinary negligence or breach of contract.\(^7\) Such a blurring of the line between the action for deceit on a fraudulent marriage promise and the action for breach of promise to marry would almost certainly allow pleadings in deceit of actions that should be barred by the heartbalm statutes. This result would contravene the intent of the heartbalm statutes, would introduce opportunities for abuse of the deceit action, and would justify a conclusion that the deceit action is barred by the statutes and should be denied altogether.\(^7\)

\(^6\) See W. Prosser, supra note 61, at 701-02; James & Gray, supra note 49, at 296-300.

\(^6\) W. Prosser, supra note 61, at 701; James & Gray, supra note 49, at 296-98.

\(^7\) This is described as liability for an innocent misrepresentation, as opposed to a negligent or conscious (fraudulent) misrepresentation.

\(^7\) See Green, Deceit, 16 Va. L. Rev. 749, 769-70 (1930) (quoting Justice Lamm of the Missouri Supreme Court on the problems of line-drawing in the definition of fraud): Fraud is kaleidoscopic, infinite. Fraud being infinite and taking on protean form at will, were courts to cramp themselves by defining it with a hard and fast definition, their jurisdiction would be cunningly circumvented at once by new schemes beyond the definition. Mesieurs, the fraud-feasors, would like nothing half so well as for courts to say they would go thus far, and no further in its pursuit. . . . Accordingly definitions of fraud are of set purpose left general and flexible, and thereto courts match their astuteness against the versatile inventions of fraud-doers.

\(^7\) See also James & Gray, supra note 49, at 298.

\(^7\) James & Gray, supra note 49, at 299-300.

\(^7\) If the deceit action becomes one for negligent or even innocent misrepresentations of an intent to marry, then it would become nothing more than an action for breach of promises “wearing the guise of fraudulent misstatements.” James & Gray, supra note 49, at 299. The state has chosen, in enacting the heartbalm act, to deny the promisee’s interest in suing a promisor for damages from a breached marriage promise. It has chosen to value the right to terminate engagements more highly than whatever financial and emotional injuries the promisee might suffer. As for deceit, however, the state has no interest in protecting people from suits for damages who would willfully cause others to rely on them and undergo significant expenses and emotional losses. If no marriage is ever contemplated there is no question of protecting a fraudfeasor’s right to commit fraud. In fact, the heartbalm statutes were intended to eliminate
Prevention of fraud and giving redress for fraud are important social goals. But if deceit actions on a fraudulent marriage promise are to serve these goals in states with heartbalm statutes, the applicable fraud standard must require actual intent to deceive in order to avoid violating the policies behind the statutes. In effect, then, the heartbalm acts should be read to demand that courts be very strict in construing the scienter requirement for fraud. The plaintiff must bear the burden of showing that the defendant actually possessed the intent to deceive him at the time the false marriage promise was made.

B. Limiting Damages in Deceit Actions to Avoid the Bar of the Heartbalm Statutes

Courts and commentators often interpret the heartbalm statutes to prohibit any action based on breach of promise facts that allows certain types of damages, for example loss of the expected marriage and social and financial position, humiliation, heartbreak and other trauma arising from the breach of promise to marry, and exemplary fraudulent use of the legal system. See note 46 supra. If the proof standard were to move closer to negligence, then the protection for freedom to make mistakes in engagements would become greater, and there would be no countervailing suppression of willfully harmful acts. Without the element of willfulness there can be no justification for deceit actions in light of the heartbalm statutes. See generally James & Gray, supra note 49, at 302-03, 507.

74. See James & Gray, supra note 49, at 302.

75. In addition to compliance with the heartbalm statutes, there are other valid reasons for differentiating among deceit, negligence, and strict liability. The law has developed "prophylactic" rules, such as the statute of frauds or parole evidence rules (or the heartbalm acts), that limit or deny liability in the interests of safeguarding against certain evils. When such laws exist, the notion of fraud should not be extended beyond conscious deception. Otherwise the policies of these prophylactic laws might be seriously undermined. James & Gray, supra note 49, at 302-03 & n. 8. Thus, when a plaintiff seeks a remedy in fraud that would normally be denied to him by these laws, the fraud standard must be maintained as conscious deception. This argument is appropriate in the context of the heartbalm statutes and deceit actions.

Courts must also be particularly careful to preserve the scienter requirement because of the proximity of the deceit action to the burgeoning litigation over long term, live-in, unmarried couples' agreements on property rights. Situations such as those in In re Marriage of Heinzman, 40 Colo. App. 262, 579 P.2d 638 (1977), aff'd., 198 Colo. 36, 596 P.2d 61 (1979), Marvin v. Marvin, 18 Cal. 3d 660, 575 P.2d 106, 134 Cal. Rptr. 815 (1976), or Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979), could perhaps be colored by plaintiffs to support actions for negligent misrepresentation. Suits for innocent breach have already been maintained in California on the theory of breach of implied contract. See, e.g., Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); Feldman v. Nassi, 111 Cal. App. 3d 886, 169 Cal. Rptr. 9 (1980). Regardless of the merits of such cases on other theories of recovery, e.g., Glickman v. Collins, 13 Cal. 3d 852, 533 P.2d 204, 120 Cal. Rptr. 76 (1975), courts must prevent successful suits in deceit unless a scienter is shown. Otherwise, a whole new field for abuse will be opened.


(punitive) damages. In connection with this interpretation, it is also said that the focus of the heartbalm statutes is on preventing damages that are the "direct consequences of the breach (of marriage promise)." Consistent with both these interpretations, courts in heartbalm states allow actions to recover damages on theories of restitution, unjust enrichment, and conditional gifts. These recoveries do not include any of the prohibited types of damages and are not consequences of the breach of promise but result from the enforcement of other legal interests. In actions to recover damages for a sham or void marriage, the otherwise prohibited mental suffering and punitive damages are awarded. These damages are not inconsistent with the statutes' prohibition because they are not direct consequences of any breach of promise; they arise directly out of the fraudulently induced reliance and change of position. The damages are to redress only the fraud.

If the deceit action on a fraudulent marriage promise is also to fall outside the bar of the heartbalm acts, recoveries must not include damages deemed prohibited by the acts. The calculation is complicated by the fact that the limits on damages allowable in deceit actions are not settled, but in fact vary according to the nature of the partic-

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78. See Brockelbank, supra note 2, at 12; Comment supra note 2, at 408.
79. See In re Marriage of Heinzman, 40 Colo. App. 262, 264-65, 579 P.2d 638, 640 (1977), aff'd, 198 Colo. 36, 596 P.2d 61 (1979) (en banc); Piccininni v. Hajas, 180 Conn. 369, 373, 377 A.2d 857, 888 (1980); De Ciccio v. Barker, 339 Mass. 457, 458-59, 159 N.E.2d 534, 535 (1959); Waddell v. Briggs, 381 A.2d 1132, 1136 (Me. 1978); cf. Menhusen v. Dake, 334 N.W.2d 435, 436 (Neb. 1983) (breach of promise to marry action awards damages only for injuries that flow "directly from the unilateral refusal of the promisor to carry out the promise"); injury from broken cohabitation arrangement not directly from breach of promise to marry). Most of the acts are worded so as to abolish the remedy for breach of promise. See H. CLARK, supra note 2, at 30; Brockelbank, supra note 2, at 15. The heartbalm statutes are intended to remove restraints on the freedom to become engaged and to break off engagements at will. Any damages that flow from that socially favored exercise of freedom would run counter to the intent of the heartbalm acts. See H. CLARK, supra note 2, at 16; Note, supra note 2, at 213-14.
80. See notes 39-40 supra and accompanying text.
81. See Morris v. MacNab, 25 N.J. 271, 279-80, 135 A.2d 657, 662 (1957); Tuck v. Tuck, 14 N.Y.2d 341, 343, 200 N.E.2d 554, 555, 251 N.Y.S.2d 653, 655 (1964) ("substantial damages . . . for injuries"). It appears that expectancy damages are not recoverable by such actions.
82. See Langley v. Schumacker, 46 Cal. 2d 601, 603-04, 297 P.2d 977, 977 (1956); Morris v. MacNab, 25 N.J. 271, 279-80, 135 A.2d 657, 662 (1957). Indeed, because deceit is a tort action, recovery is limited to damages proximately caused by the fraud. See James & Gray, supra note 49, at 528. See generally Judge Fuld's opinion in Tuck v. Tuck, 14 N.Y.2d 341, 200 N.E.2d 554, 251 N.Y.S.2d 653 (1964). The reliance by the defendant on the willfully fraudulent representations in Tuck v. Tuck is different only as a matter of degree from the reliance a person might make on a fraudulent marriage promise. The distinction is that the plaintiff was actually led to believe she was married, though the ceremony was a sham. Indeed, considering the probable irreversible expenditures, sales, employment decisions and transference of property to the fraudfeasor, the mental suffering damages resulting directly from the fraud may be great indeed.
83. See W. PROSSER, supra note 61, at 733-36. Prosser states that the confusion on the issue of damages in deceit stems from the action's proximity to other forms of relief. See also Note,
ular action. This variance gives courts the opportunity and the duty to exercise discretion in determining what damages should be allowed in a particular deceit action. Courts can use the policies of the heartbalm statutes to tailor the allowable recovery instead of barring the cause of action altogether.

There are two standard rules for damages in deceit actions. One is the “out-of-pocket” rule, meant to return the plaintiff to the position he would have been in but for the fraud and his reliance on it. It is based on restitution and reliance damages. This measure of recovery appears to fall outside the prohibition of the heartbalm acts because it permits recovery only insofar as it rectifies harmful results of the fraud. The other is the “loss-of-bargain” rule, meant to give the plaintiff the benefit of the bargain he thought he had with the defendant. Although the former rule is “more consistent with the purpose of tort remedies, which is to compensate the plaintiff for a loss sustained, rather than to give him the benefit of any contract bargain,” the latter is the majority rule in the United States. This is largely because most deceit actions arise out of business transactions where the out-of-pocket remedy is often insufficient to make the plaintiff whole. The loss-of-bargain remedy, if applied in a deceit action on a fraudu-

Measure of Damages for Fraud and Deceit, 47 VA. L. REV. 1209, 1209 n.2 (1961) (quoting Han•nnigan, The Measure of Damages in Tort for Deceit, 18 B.U. L. REV. 681, 681 (1938)):

Upon this subject American courts are divided; text-writers present a broken front; a left wing wars with a right; academicians cannot agree; the Law Institute advisers dissent from the reporters; precedent neutralizes precedent; abstract reasoning carries no persuasion; argu­ments have no other effect than to engender counter-arguments; one practical considera­tion clashes with another practical consideration; nothing is settled as the just law or general rule.

See also H. CLARK, supra note 2, at 17 & n.16.

84. See generally, W. PROSSER, supra note 61, at 733-34.

85. See id. at 735; C. MCCORMICK, supra note 2, at 452-54. Due to the disarray and confusion in this area of the law, the courts have considerable discretion in the matter of damages. “It should be noted that the arguments on either side do not all have equal weight in all types of situations and probably neither rule is or should be followed with entire consistency in any juris­diction.” James & Gray, supra note 49, at 531.

86. See C. MCCORMICK, supra note 2, at 449; W. PROSSER, supra note 61, at 733-34; James & Gray, supra note 49, at 528.

87. As such, it does not flow directly from the breach of promise but is a consequence of the fraud. It is already widely accepted that restitution falls outside the heartbalm acts and it is really not inconsistent to exclude reliance damages from the scope of the acts as well.

Other policy considerations also support recovery of reliance damages. The state has no interest in permitting willful fraud, and the heartbalm acts should not be read to immunize it. See note 46 supra and accompanying text. Furthermore, these damages are actual, if not always easily calculable (for example, loss of employment, loss on sale of business) and the jury can easily distinguish between them and damages for a lost marriage.

88. See W. PROSSER, supra note 61, at 734; James & Gray, supra note 49, at 527-29.

89. W. PROSSER, supra note 61, at 734. See C. MCCORMICK, supra note 2, at 449; Note, supra note 83, at 1213.

90. See W. PROSSER, supra note 61, at 734-35; James & Gray, supra note 49, at 529, 531 & n.14. Prosser states that two-thirds of the states have adopted the loss-of-bargain measure of damages.
lent marriage promise, would contravene the ban of the heartbalm acts because it would permit the plaintiff to recover damages for the lost marriage. Expectancy damages flow directly from the breached marriage promise and as such are barred by the acts.91

It is the out-of-pocket measure of damages that is appropriate to the problem of fraudulent promises to marry. It is precisely the possibility that a party might rely on a fraudulent marriage promise to such an extent that he or she gives up employment, undergoes moving expenses, spends money on a new house, takes out a lease, buys furnishings, makes wedding preparations, or undergoes any other expenses, that the action should protect — not the party's interest in a marriage that was never intended. The out-of-pocket remedy would enable a defrauded plaintiff to recover these sums.92

Despite the fact that the courts in most states apply the loss-of-

91. The very fact that the loss-of-bargain rule assumes that the underlying transaction stands, see James & Gray, supra note 49, at 528, contravenes the clear policy of the heartbalm acts that damages are not recoverable for breached marriage promises or actions arising therefrom. Especially considering the absolute policies voiced by the heartbalm acts against treating marriage as a property contract, it would be a gross error to apply the benefit-of-the-bargain rule, with its strong property transaction orientation, to the personal tort of fraudulent wedding promise. See note 79 supra and accompanying text. See also the New York statute set out in note 8 supra. The benefit-of-the-bargain rule would permit all the damages allowable under breach of promise to be recoverable under deceit. The loss of the expected bargain would include expected wealth and social position, damages that are one of the most powerful attractions to unscrupulous plaintiffs. See note 64 supra. Either damage rule allows recovery of consequential mental suffering and punitive damages. See note 109 infra and accompanying text. If the underlying promise were deemed to stand, however, there would be no way to distinguish between heartbalm-type consequential damages flowing from the lost marriage, and consequential damages flowing from the fraud alone.

If the loss-of-bargain rule were to apply in deceit actions on a fraudulent marriage promise, then only the fraud standard would distinguish it from breach of promise. See generally notes 68-75 supra and accompanying text. Although the necessity to prove intent may be a significant barrier to sham claims, the potential for abuse and blackmail would be dramatically raised by the introduction of these potentially excessive damages. Furthermore, if there is one form of damages that is usually associated with breach of promise, it is the expectancy remedy. As such it is prohibited under even the most permissive interpretation of the heartbalm statute.

92. It is not clear in the cases involving marriage promises what rules of damages the courts considered or applied. In the few cases where courts have decided claims pleaded in deceit for fraudulent promises to marry, they have not been consistent in assessing damages. It is not clear whether the plaintiff claimed expectation damages for loss of expected marital position and wealth in any of these cases. See Langley v. Schumacker, 46 Cal. 2d 601, 607, 297 P.2d 977, 981 (1956) (claiming mental suffering, loss of employment and other expenses incurred plus punitive damages); Piccininni v. Hajus, 180 Conn. 369, 370, 429 A.2d 886, 887 (1980) (claims for property transferred to the defendant in reliance on the fraudulent wedding promise amounted to about $40,000 worth of furnishings and other improvements on defendant's house that were intended for the parties' joint benefit after marriage); Perthus v. Paul, 81 Ga. App. 133, 134, 58 S.E.2d 190, 191 (1950) (claiming actual and punitive damages based on loss of employment, moving expenses and labor expended in reliance on the fraudulent promise); Harsche v. Czyz, 157 Neb. 699, 700, 61 N.W.2d 265, 267 (1953) (claiming actual pecuniary losses and expenses sustained). In Perthus v. Paul and Langley v. Schumacker, an unspecified portion of the damages pleaded was for the plaintiff's humiliation, public disgrace, mental anguish, and wounded feelings. The only court actually to decide the question of these damages excluded recovery for mental anguish, holding that in fraud the measure of damages is that which will compensate the plaintiff for the actual loss occasioned by the fraud. Harsche v. Czyz, 157 Neb. at 710-11, 61
bargain rule, few courts appear to follow either of the two rules exclusively.93 It is widely recognized that the rules for damages in deceit actions are flexible.94 There are commanding reasons for denying loss-of-bargain damages in favor of the out-of-pocket remedy: the speculative nature of the expectation damages in a deceit action for fraudulent marriage promise,95 the clear and strong social policy expressed in the heartbalm acts against expectation damages,96 the fact that allowing expectation damages would place the entire action inside the bar of the heartbalm act,97 and the common interpretation of the heartbalm statutes to prohibit damages arising directly from the breach.98

Under either the out-of-pocket or loss-of-bargain rules, the plaintiff may also usually recover for consequential damages such as mental suffering as long as they are proximate results of the fraudulent misrepresentation.99 In order to avoid the bar of the heartbalm statutes, damages recovered for mental suffering would have to arise out of the defendant's fraud and not out of his failure to marry the plaintiff. Courts would have to be careful to preserve this distinction. Thus, damages could only be awarded for mental suffering that is a direct consequence of the detrimental reliance and change of position wrong-

N.W.2d at 272. In the other cases the courts did not expressly consider the damages question but only the question of whether the action was barred by statute.

In cases involving deceit actions for fraudulent inducement to enter sham or illegal marriages, only one court has considered the question of damages. See Morris v. MacNab, 25 N.J. 271, 135 A.2d 657 (1957). In Snyder v. Snyder, 172 Misc. 204, 14 N.Y.S.2d 815 (1939), the court, in rejecting a motion to dismiss, did not describe the damages pleaded. In Tuck v. Tuck, 14 N.Y.2d 341, 343, 200 N.E.2d 554, 555, 251 N.Y.S.2d 653, 655 (1964), the court said simply that the damages claimed were "substantial." In Morris v. MacNab, the jury awarded $1500 compensatory and $1000 punitive damages for the "shame, humiliation, and mental anguish" caused by the defendant's fraudulent inducement to enter a bigamous marriage, and $6000 compensatory and $600 punitive damages for fraudulent inducement to advance money to the defendant. The court denied a damage claim for services rendered defendant as housewife. 25 N.J. at 274-75, 135 A.2d at 658-59. The higher court allowed the compensatory and punitive damages and stated that in the case of willful as opposed to negligent wrongs, recovery should be available for proximate mental anguish, shame and humiliation. 25 N.J. at 280, 135 A.2d at 662.

93. See C. McCormick, supra note 2, at 452; W. Prosser, supra note 61, at 735; James & Gray, supra note 49, at 531.

94. See notes 83-85 supra and accompanying text.

95. See C. McCormick, supra note 2, at 452; James & Gray, supra note 49, at 531; Note, supra note 83, at 1227-28.

96. See note 76 supra.

97. If the damages allowable were barred by the state heartbalm statute and the court would not limit the damages, it would be forced to deny the entire cause of action. This would have the undesirable effect of using the heartbalm statute, a law designed to eliminate fraud, to immunize fraud. See note 46 supra.

98. See note 79 supra.

99. See C. McCormick, supra note 2, at 459; W. Prosser, supra note 61, at 735; James & Gray, supra note 49, at 529 & n.7.
fully induced by the defendant's fraudulent promise and could not be awarded for the heartbreak and wounded feelings resulting from the loss of an expected marriage. In fact, in deceit actions for fraudulent inducement to enter illegal or sham marriages, courts have made this distinction when they have permitted mental suffering damages despite the heartbalm acts. These damages resulted from the wrongful inducement to change status or undergo a sham ceremony and were not a product of the breach of promise. However, in the case of a fraudulent marriage promise inducing detrimental reliance, if this distinction exists at all, it is probably too nice to be practical. Courts would have to instruct juries to distinguish mental suffering that is the result of a broken heart and dashed hopes, from mental suffering that is the result of the plaintiff's wrongfully induced reliance and change of position. The small possibility that juries could make such a distinction is probably outweighed by the likelihood that they would award damages for the total suffering the plaintiff convinces them he underwent. If, then, this distinction cannot be preserved by juries, mental suffering damages cannot avoid the bar of the heartbalm acts and must be eliminated if the deceit action is to stand. It is consistent with the flexibility courts possess in fashioning damage remedies in deceit actions for them to tailor the remedy to be consistent with the certainty of calculation, the circumstances of the substantive action, and the adequacy of the other damages allowable to make the plaintiff
whole and to deter future fraud.\textsuperscript{104}

Punitive damages are also ordinarily allowed in deceit actions when the deception is deliberate or wanton,\textsuperscript{105} but because these claims invoke evidence of the defendant's wealth, they could reintroduce that element of the breach of promise suits that was universally decried as resulting in excessive damage verdicts and abuse by unscrupulous plaintiffs.\textsuperscript{106} However, unlike damages for mental suffering, punitive damages can avoid the heartbalm statute bar. The distinction between breach of promise damages that flow from the breach and deceit damages that flow from the fraud is more tenable for punitive than for mental suffering damages. In a breach of promise case, the jury is instructed to consider the evidence of the defendant's wealth primarily to give the plaintiff the estimated value of his expected marriage to the defendant and to assess a punishment on the defendant in order to deter future breaches of promise.\textsuperscript{107} In deceit, the jury is instructed to assess a punishment in order to deter future fraud. Because of the emphasis on the defendant's fraudulent act, the jury's focus must be primarily on the intentional wrong done and not on the lost marriage.\textsuperscript{108} Although the potential for verdicts out of line with

\textsuperscript{104} See C. McCormick, supra note 2, at 452-54; W. Prosser, supra note 61, at 733-35; James & Gray, supra note 49, at 529-53.

\textsuperscript{105} See W. Prosser, supra note 61, at 735-36; James & Gray, supra note 49, at 529. It may be preferable to deny punitive damages altogether if there is reason to suspect that juries are awarding these damages for sentimental reasons, thereby allowing excessive recoveries that can attract unscrupulous plaintiffs and open defendants to blackmail and extorted settlements. See generally Comment, supra note 2, at 408-09; note 16 supra and accompanying text.

As regards the scienter requirement, see notes 68-75 supra and accompanying text, because punitive damages may only be claimed when the defendant acted willfully or maliciously, allowable punitive damages should decline if the fraud standard shifts toward a negligence standard and the defendant's fraud becomes more circumstantial and less willful. As a result, punitive damages should not be available to plaintiffs with borderline cases of fraud where potential for sham claims may be the highest. In fact, it is generally stated that only consequential and actual damages may be recovered in negligent misrepresentation actions. See James & Gray, supra note 49, at 534.

\textsuperscript{106} See note 20 supra and accompanying text. Excessive punitive damages have also been identified as the outlet for much of the jury's venting of its indignation. See note 78 supra and accompanying text.

Of course it is true that the trial court, or the reviewing court on appeal, may reduce the jury's award of damages if clearly erroneous. The court in Stanard v. Bolin, 88 Wash. 2d 614, 620-21, 565 P.2d 94, 97 (1977), emphasized this. Nonetheless, appellate review has been criticized as inadequate in the breach of promise context where juries are usually given almost complete discretion to set damages. C. McCormick, supra note 2, at 402-03. However, this does not preclude reviewing courts from scrutinizing awards in deceit actions much more carefully.

\textsuperscript{107} See the jury instruction given in a traditional breach of promise suit, set out in note 19 supra. Under the traditional rule, a conscientious jury that understands its instructions in a breach of promise case will transfer a sizeable portion of the defendant's fortune to the plaintiff despite its own sense of justice. Furthermore, juries have traditionally been encouraged to assess punishment according to their feelings. See Brockelbank, supra note 2, at 10-11; note 19 supra.

\textsuperscript{108} In the case of deceit, a conscientious jury considers evidence of the defendant's wealth in its traditional and highly favored role as dispenser of community justice. It is asked to apply its sense of justice to assess punitive damages only to the degree of the defendant's fraudulent wrong.
the injury inflicted and more in line with the jury’s passions and prejudice is present in any jury award of punitive damages, juries in our legal system are regularly entrusted to make these awards. Their ability to preserve the necessary distinction may depend largely on the quality of the trial judge’s instructions.

Courts do have control over a plaintiff’s abuse of punitive damages in that they can deny access to those who would plead nominal reliance damages in order to get before a jury and present a sympathetic case for a large punitive damages or mental suffering award. Significant reliance damages must be pleaded in order to get before the court. Courts must be vigilant in enforcing this requirement in order to prevent plaintiffs from using the deceit action to defeat the heartbalm statutes.

It has been seen, then, that damages in deceit actions on a fraudulent marriage promise can be limited in a flexible manner consistent both with the policies behind the tort action of deceit and with the prohibition of the heartbalm acts against expectancy, mental suffering, and punitive damages arising from the breached promise. Damages must be carefully limited by courts to actual damages incurred by reliance on the defendant’s promises and to punitive damages awarded for, and aimed at, deterring future fraudulent acts. Expectancy and mental suffering damages must be deemed barred by the heartbalm statutes. The heartbalm statutes should be read to limit the extent of recovery under deceit when necessary to preserve statutory policies, but they should never be read to deny recovery altogether. It is better

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109. Arguments dating back half a century have maintained that juries are incapable of objectively ruling in breach of promise cases. See note 23 supra. Whether these arguments are still persuasive in the context of deceit actions is beyond the scope of this Note. However, an argument against a cause of action because of the jury’s shortcomings is really an argument against the use of juries, and is perhaps inappropriate to justify abolishing an action.


110. If courts, more familiar with the shortcomings of the jury than this writer, find that punitive damages would be a source of excessive verdicts based largely on irrelevant considerations, then they are urged to eliminate punitive damages from the action. Although some deterrent effect will be lost, this is probably outweighed by the strong public policy against allowing damages to be awarded as heartbalm for a lost marriage. Many courts and commentators have considered punitive damages the greatest source of abuse of the breach of promise action. See note 78 supra.

111. W. Prosser, supra note 61, at 731; James & Gray, supra note 49, at 528.

112. This is something for the courts to decide on a case-by-case basis. If the facts show grievous, willful wrongs on the defendant’s part and it seems clear the plaintiff is not bringing a sham claim, then perhaps the courts could allow the action despite only nominal actual damages.
to limit recovery than to allow no recovery at all and thereby immu-
nize fraudulent conduct of no value to society.

C. Avoiding Problems of Abuse

The final question facing heartbalm-state courts considering
whether or not to allow deceit actions is whether, as feared, the action
will inevitably be used by unscrupulous plaintiffs to circumvent the
heartbalm acts. This fear of abuse by unscrupulous plaintiffs was
probably the greatest reason behind the enactment of the heartbalm
acts113 and is also the dominant reason given for rejecting actions in
deceit for fraudulent marriage promises.114 Thus, in states with
heartbalm statutes, courts must ensure that allowing deceit actions
will not reintroduce the evils halted by enactment of the laws. How­
ever, if it can be determined that there is little danger of abuse of the
decit action, and that in certain situations there should be a remedy
for people harmed by fraudulent marriage promises, then the
heartbalm statutes should not be construed in such a way as to protect
defendants making those fraudulent misrepresentations.115 Blackmail
using the threat of a breach of promise action was a common abuse of
the breach of promise action in states that later enacted heartbalm
legislation, and one of the major factors in successful blackmail was
the extraordinarily light burden of proof.116 Generally the only issue
of fact is whether there was an initial promise of marriage (the breach
is usually self-evident), so evidence consists of testimony as to the

113. See notes 25-32 supra and accompanying text.
114. See notes 53-55 supra and accompanying text.
115. See, e.g., Feinsinger, supra note 2, at 1000:
   The danger of circumventing the statute is obvious. But courts cannot escape the burden of
   construing legislation as sweeping as this, so as to eliminate the evils aimed at without de­
   stroying rights not considered by the legislature, whose continued existence may be impor­
   tant to society and to individuals.
   But see A.B. v. C.D., 36 F. Supp. 85, 87 (E.D. Pa.), affd. per curiam, 123 F.2d 1017 (3d Cir.
   1940), cert. denied, 314 U.S. 691 (1941) (emphasis added) (stating: “The evil sought to be over­
   come [by the heartbalm statutes] was reasonably deemed serious enough to justify a denial of the
   judicial process to those asking relief from real as well as fictitious wrongs.”).
   (E.D. Pa.), affd. per curiam, 123 F.2d 1017 (3d Cir. 1940), cert. denied, 314 U.S. 691 (1941);
   Comment, supra note 2, at 407. The court in A.B. v. C.D. disregarded the burden of proof
   argument because it was concerned with meritless plaintiffs merely being able to state a good
   cause of action. It presumed that these plaintiffs could coerce a settlement from publicity-shy
   defendants once they could threaten them with a trial. The court did not consider it important to
   take up separately the different factors which might induce such defendants to settle out of court.
   However the probability of winning the suit (or rather the defendant's fear of losing) is probably
   an important issue in determining the potential for abuse apart from whether or not the plaintiff
   can get into court. This is especially true if we assume defendants to be less publicity-shy about
   these matters today, and because we have seen that damages can be limited in deceit actions and
   thus defendants are more protected from excessive verdicts.
   Because the burden of proof is important as a barrier against abuse, the maintenance of this
   barrier is a strong reason for courts to restrict the scienter requirements to one of actual knowl­
   edge, of conscious deception.
existence of a marriage promise, evidence of association, and perhaps some love letters or evidence of sexual intercourse. If the plaintiff can show a breach of promise, an almost insuperable burden shifts to the defendant.\textsuperscript{117} Yet it is also true that although the breach of promise action can still be maintained in a majority of the states, blackmail is no longer an issue. Either the problem no longer exists or it occurs only infrequently.

In contrast with breach of promise to marry actions, the burden of proof on the plaintiff in a deceit action is much greater and should pose a formidable barrier to unscrupulous plaintiffs.\textsuperscript{118} It cannot be possible merely to construct a promise from scandalous circumstances and the perjured testimony of the plaintiff and expect a good chance of winning because it is the defendant's fraudulent intent that has to be proved.\textsuperscript{119} Defendants, knowing that the plaintiff will have difficulty establishing fraud, should be less likely to settle out of court for fear of having no adequate defenses at trial, and unscrupulous plaintiffs should be more hesitant in bringing unfounded suits.\textsuperscript{120} This tougher standard of proof should go a long way toward eliminating the potential for false claims being used successfully to extort settlements.\textsuperscript{121}

\textsuperscript{117} See notes 29-30 supra and accompanying text.

\textsuperscript{118} The affirmative burden of proving fraud . . . would seem to be a substantial safeguard against trumped-up contracts. Moreover, the safeguard is enhanced by the prevailing procedural rules requiring clear and convincing evidence of fraud and holding that the mere nonperformance of a contract does not warrant an inference of the requisite fraudulent intent.

\textsuperscript{119} See notes 68-75 supra and accompanying text.

\textsuperscript{120} In a deceit action the defendant may properly defend a claim against him with counter-evidence about the state of his own mind at the time he made the promise. See James & Gray, supra note 49, at 299.

The problem with the breach of promise suit for the defendant, at least until recent times, was that once it began the defendant was completely at the mercy of the prurient minds of the jury. There were no real issues to dispute on the evidence except the existence of the promise. The trials consisted mostly of oral testimony and were very emotional. Any defenses were necessarily reputation-impugning (such as promiscuity or venereal disease). See note 32 supra. See also the wonderfully comic breach of promise trial in C. Dickens, The Posthumous Papers of the Pickwick Club (London 1836-37). The intent requirement of the deceit action, however, would not have the defendant focus on reputation-impugning evidence in order to rebut the plaintiff's claim.

\textsuperscript{121} It is reasonable to assume that in many cases where circumstantial evidence is strong enough to support a finding of the defendant's intent at the time a marriage promise was made, the events would be sufficiently public that the defendants would have less reason to fear public-
If abuses have disappeared from public view in states allowing breach of promise actions, changing social attitudes and mores must be playing a large part in that change, as regards both plaintiffs' motivations for bringing unfounded suits and defendants' willingness to contest them. Although this Note can only speculate in these matters, men may be less likely today to be embarrassed about contesting a fraudulent marriage promise suit in the courts and therefore they may be less likely than men in the past to settle sham claims out of court. And, certainly to the extent that damages may be limited in fraud actions and that the burden of proof is stiffer, defendants will be more confident about going into court to contest a suit on the merits, and plaintiffs less eager to bring meritless claims.

Deceit actions also substantially reduce the potential for jury awards based on sympathetic consideration of the plaintiff's lost marriage and wounded feelings because in deceit actions, with the proper instructions, the jury's attention can be focused on the fraudulent wrong and the damages resulting directly from it. Evidence of sexual intercourse and mere association, if it is ever relevant to prove the intent of the defendant to defraud the plaintiff, should also be less prejudicial. Present-day Americans are quite aware of the relatively free way modern couples associate (including cohabitation) before making commitments to marry. Furthermore, the breach of promise/deceit situation may no longer have the kind of prejudicial effect on a jury it had fifty years ago when abuse was at its peak.

CONCLUSION

Deceit is an action based on a different wrong than breach of promise to marry. Yet because of the similarities in facts, the sometimes intangible and shifting nature of the intent factor separating the two actions, the problems of limiting damages, and the past use of pleadings to extort settlements from defendants, they are sometimes

122. An interesting example of this is found in a case reported in both Time and Newsweek in 1967. According to the reports, an international love triangle began at a jet-set nudist colony on the Baltic Sea and ended in a breach of promise action in the United States and criminal charges of pandering in Germany. Considering the high public profile that the defendant American playboy took both in his defense of the breach of promise action and during the affair, he was apparently not so embarrassed as to pay to keep the affair quiet. See The Old Class, NEWSWEEK, Mar. 6, 1967, at 38-39; Domestic Relations: Once Again into the Breach, TIME, Mar. 3, 1967, at 50.

123. See notes 107-08 supra and accompanying text. Since detrimental reliance must be shown, the jury's attention should clearly be focused on that conduct and not on the fact that the defendant lost a desirable marriage. But see H. CLARK, supra note 2, at 17, quoted at note 118 supra.

124. Although this is mere speculation, the fact that breach of promise is no longer popular scandal, and is no longer perceived as an easy route to riches even in states where the action is still available, may have to do with a feeling that juries today will not be so generous to unscrupulous plaintiffs.
seen as essentially the same actions. Courts should be careful not to be fooled by these similarities and should instead focus on their own role in maintaining deceit as a distinct cause of action that lies outside the prohibition of the heartbalm acts.

This Note concludes that deceit actions, carefully construed and managed by courts, are outside the statutory bar of the heartbalm statutes and are not subject to the grave abuses once feared. If the courts remain mindful of the constraints of the heartbalm statutes and remain alert to potential problems, they can fashion the deceit action to lie outside the statutes without fear that it will reintroduce the evils eradicated by those laws.