

UNIVERSITY OF MARYLAND SCHOOL OF LAW

INTRODUCTION TO CIVIL PROCEDURE

Section C

(Two Hours)

Day Division

Tuesday, December 16, 2008

Professor Robert J. Conclin

9:00 A.M. - 11:00 P.M.

No. _____

Signature: _____

Print Name: _____

Submitted Electronically Yes _____ No _____

INSTRUCTIONS:

1. **Honor Code.** Student conduct, during examinations and at all other times, is governed by the Student Honor Code.

2. **Your Name, Examination Number and Submission.** Sign and print your name in the blanks above. Put the examination number, course title and instructor name on the examination envelope. Indicate whether you are submitting the examination electronically. Submit the examination questions at the conclusion of the examination. Do **not** put the questions in the examination envelope.

3. **Time.** Submit your examination answers within the announced time for the examination. If you submit your answers late you will be subject to a penalty.

4. **Computer Exams.** You may take the examination by computer. This is an *Option 2 – Open Mode – access to Exam4 and student computer-based notes – no Internet Access – “drag and drop” prohibited, examination.*

If you use a computer you must use the Exam4 examination-taking software provided by the Law School. You must provide your own computer and must download a copy of the Fall 2008 version of the Exam4 software to your computer, test the software, and have the computer in working order before the date of this examination.

At the end of the examination, choose the "Submit Electronically" function in the Exam4 software. The software will request your Exam ID (Examination Number). Put

the course name on your answer as instructed in the handout, but do **not** put your name anywhere on your answer. Submit your answer within the time limits for the examination. After submitting your answer electronically, return to the examination room promptly and turn in (but do not seal) the examination envelope, with a notation on the envelope stating "Submitted Electronically." At the same time, turn in your examination questions to the proctor.

Technological Problems: If you experience a technological problem during the examination, consider the amount of time remaining and decide whether you should continue (or restart) the examination in Blue Books. No additional time will be provided for technological problems. Responsibility for submitting your answers on time electronically lies entirely with you. The Information Technology (IT) Department will assist in retrieving examination files from your computer, and the Office of Registration & Enrollment will accept an IT-certified copy of an examination file retrieved from your computer as a timely submission, as long as there is no evidence of tampering with either your computer, or the examination file.

5. Handwritten Exams. If you submit handwritten answers to the examination, put the number found above on each of your Blue Book answers to the examination. Both the envelope and your answers should contain your examination number, the course name, and the instructor's name. Do **not** put your own name anywhere on the envelope, or on the Blue Book answers.

Upon completion of the examination, put your answers in the envelope, fasten the flap, and hand in the envelope to the examination proctor. Be sure to enclose all of your answers in the envelope — you will be graded on only what is inside the envelope. Do **not** put the examination questions in the envelope. Hand in the questions separately to the examination proctor. You are responsible for ensuring that all of your completed answers and questions are handed in to the examination proctor.

6. Special Instructions. The examination consists of the beginning of a judicial opinion and several questions about it. Each question counts for a different percentage of the overall grade and the respective percentages are indicated at the end of each question. Allocate your time accordingly. Explain your answers fully. The reasons you give for answers usually will be more important than the answers themselves. Analyze the issues presented by the fact pattern, do not just tell me what you know generally about the applicable law. No credit will be given for long descriptive statements about law in the abstract. If you need more information to resolve an issue, say what else you need to know.

You may bring any materials you like into the examination with you but (except for the Exam4 software) you may not use electronic communication devices of any kind in completing the examination.

**BRIAN STRAYER,
Plaintiff,**

v.

**FRANKEL & ASSOCIATES and CITIBANK, N.A.,
Defendants.**

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

PER CURIAM:

This civil action arises out of the representation of Brian Strayer (Strayer) by Frankel and Associates' (F&A, or the Firm), in a personal injury action in West Virginia state court. F&A is a five person general practice law firm with a single office in Morgantown, West Virginia. It is incorporated as a Professional Corporation under the laws of West Virginia and limits its practice exclusively to that state. Strayer is a domiciliary of Maryland and a resident of Baltimore. Citibank, N.A., (Citibank), the second defendant, is an international financial institution incorporated under the laws of New York. It has a principal place of business in New York City and more than seven hundred other banking offices scattered throughout the United States (including Maryland but not West Virginia).

Strayer was hit while riding a motorcycle in Morgantown, West Virginia, by a well known sports personality who had run a stop sign. It was Strayer's first and only trip to West Virginia. He had grown up listening to John Denver music and wanted to see what "almost heaven" looked like. After the accident, Strayer spent two days recovering from his injuries in the West Virginia University hospital (West Virginia University is located in Morgantown), and another six weeks in physical therapy in Kernan Hospital in Baltimore. His motorcycle, a 2005 Harley Davidson Ultra Classic Electra Glide, was not seriously damaged.

Strayer hired F&A (on the recommendation of a Baltimore friend who had used the Firm to arrange a property transaction in West Virginia), to represent him in an action against the person who hit him. He made the initial contractual arrangements with the Firm by telephone and communicated with it thereafter, principally to sign documents and authorizations, by email and fax transmission. He never returned to West Virginia after the accident. He decided that heaven could wait. Being hired from long distance was not an unusual experience for F&A. About a third of the Firm's practice consists of representing West Virginia University students in misdemeanor drug cases in state court and arrangements for such representation often are made by the students' parents over the phone from outside the State. The Firm is highly regarded in West Virginia, does no advertising, and receives almost all of its business from referrals.

Strayer filed suit in West Virginia state court shortly after his discharge from Kernan Hospital. F&A conducted its one interview of Strayer while he was still at Kernan through a Towson, Maryland lawyer who had been a law school classmate of an F&A partner. The Towson lawyer did the interview for free as a kind of delayed repayment for help the F&A partner had given her on a law school writing assignment. The law firm for the defendant's insurance company also interviewed Strayer while he was at Kernan. After hearing the full story of the accident, the insurance company agreed to settle the claim for \$85,000. It gave F&A a check for that amount, to be paid to Strayer after F&A's fees and expenses were deducted.

Shortly after agreeing to represent Strayer, F&A opened an online client trust account in his name with Citibank. A client trust account is an interest bearing bank account used to hold funds (usually payments on court judgments or settlement agreements), received on a client's behalf. Banks like such accounts because they pay lower interest rates than other types of accounts. An individual trust account is opened whenever funds received for a client are large, or are to be held for a long time. Citibank understood that the funds in the Strayer account were payments for personal injury claims and that personal injury claims are not taxable under the Internal Revenue Code. It also knew that the funds, both principal and interest, belonged to Strayer and not F&A. Nevertheless, over a period of several months, and in accordance with instructions received from F&A online, Citibank knowingly made half a dozen electronic transfers from the account to the Internal Revenue Service to pay F&A's federal tax obligations.

The amounts and dates of the deposits to the Strayer trust account, along with all transfers from the account, were posted online on a daily basis and emailed to F&A on a monthly basis. Based on this information, F&A periodically moved money from other Citibank accounts to the Strayer account to cover payments made from the latter. Strayer discovered this practice when he asked for his settlement money and was told that he would have to wait a couple of weeks before he could have it. Upon investigating, he discovered that F&A needed the time to transfer enough money from other accounts to cover his settlement check.

Upset at what he took to be a sort of Ponzi scheme, Strayer filed the present civil action in Maryland state court. In his complaint, he alleged that F&A fraudulently promised to hold all money obtained on his behalf in a separate trust account, that the Firm knew this representation was false, that he justifiably relied on the representation, and that he was injured as a result. He alleged that this was a violation of both Maryland and West Virginia tort law. In his claim against Citibank, Strayer alleged that the Bank cooperated in the fraudulent scheme to misappropriate his funds by helping to set up and administer the client trust account and by using electronic means to transfer funds from the account to satisfy F&A's federal tax obligations. He alleged that this also was a violation of both Maryland and West Virginia tort law. He asked for \$75,000 in damages (he owed F&A approximately \$10,000 in costs and fees).

After the defendants removed the case to this Court, Citibank moved to dismiss for lack of personal jurisdiction and F&A moved to dismiss for lack of venue. In the event that these motions were denied, both defendants also moved to transfer the case to the United States District Court for the District of West Virginia. Strayer moved to remand the case to Maryland state court for lack of subject matter jurisdiction. We denied Strayer's motion to remand but have not yet acted on either of the defendants' motions to dismiss or their joint motion to transfer.

After his motion to remand was denied, Strayer amended his complaint to add a claim under the Federal Racketeer Influenced and Corrupt Organizations Act (RICO). To state a claim in civil RICO a plaintiff must show that he has been injured in his business or property by a pattern of racketeering activity. A pattern of racketeering activity requires at least two acts of racketeering and may include federal wire fraud. The Federal Wire Fraud statute makes illegal any scheme or artifice to defraud which involves the use of an electronic transmission of funds. Strayer alleged that the defendants committed federal wire fraud when they misappropriated his settlement funds to pay F&A's federal tax obligations and that this wire fraud constituted a "pattern of racketeering activity" under RICO.

Strayer's original retainer agreement with F&A required the parties to arbitrate any dispute arising out of their relationship before filing a lawsuit. Maryland and West Virginia law permit a party to rescind such an arbitration agreement if he or she acts before an award has been made. The defendants asked for a stay of the present action to permit the parties to arbitrate the dispute but Strayer filed a formal notice exercising his right to rescind the arbitration agreement and argued that a stay should be denied on the ground that there was no longer any agreement to arbitrate. Strayer wanted to avoid arbitration because it would deny him access to a jury, full discovery, a written decision based on reasons, a transcript of the proceedings, the application of the Federal Rules of Evidence, and a judicial instruction on the law [assume all of these are true], though he would be able to appeal an arbitration decision to state or federal court (assuming jurisdictional requirements otherwise were met). There is a Federal Arbitration statute, and it does not permit a party to rescind an agreement to arbitrate unilaterally, but it also does not apply to contracts for legal services. We have yet to act on the defendants' motion for a stay.

The defendants also moved to dismiss Strayer's complaint for failure to state a claim upon which relief may be granted. Maryland Rule of Civil Procedure 9, which governs the "Pleading of Special Matters," requires that a claim for "fraud based on an electronic communication" be accompanied by an affidavit describing pre-filing efforts to resolve the claim informally. Failure to attach such an affidavit is grounds for dismissal for failure to state a claim. Strayer did not attach an affidavit to his complaint when he first filed it in Maryland state court, or in this court after the action had been removed. The Maryland affidavit requirement is designed to discourage the filing of internet-based fraud claims. The Rule's drafters thought it was too easy to accuse someone of fraud based on website representations and believed that the filing of such claims did lasting damage even when the claims were dismissed as false. They thought that many such

claims could be avoided if the parties were forced to discuss their differences with one another before suing. The drafters also wanted to keep internet speech as free and unfettered as possible and thought that making it harder to sue on the basis of website representations would help accomplish that task. They did not have electronic bank transfers in mind when adding the affidavit requirement to the Rule, but by its own terms the Rule applies to all fraud claims based on an “electronic communication.”

Federal Rule of Civil Procedure 9, which governs the “Pleading of Special Matters” in federal court, requires that fraud be pleaded with particularity (“in alleging fraud . . . a party must state with particularity the circumstances constituting fraud”), but it does not require an affidavit describing pre-filing attempts to resolve the claim informally. Strayer’s pleading would be adequate to state a claim for fraud under Federal Rule 9, therefore, but not under Maryland Rule 9. The defendants argue that this court must apply the Maryland Rule and dismiss Strayer’s fraud claim because it was not accompanied by an affidavit. We have not yet acted on this motion.

- 1] Did the Court rule correctly in denying Strayer’s motion to remand the case to Maryland state court for lack of subject matter jurisdiction? [15%]**
- 2] How should the Court rule on F&A’s motion to dismiss for lack of venue? [20%]**
- 3] How should the Court rule on Citibank’s motion to dismiss for lack of personal jurisdiction? [20%]**
- 4] How should the Court rule on the defendants’ motion to transfer the case to West Virginia federal court? [15%]**
- 5] How should the Court rule on the defendants’ motion for a stay to permit the parties to arbitrate the dispute? [15%]**
- 6] How should the Court rule on the defendants’ motion to dismiss for failure to state a claim upon which relief may be granted? [15%]**

Explain your answers fully.