

he had already been arrested as a contempt sanction in another case. **Mackey v. Edde Construction LLC**, 2014 WL 6454003 (D. Minn. 11/17/2014).



■ **Multiple Requests for 28 U.S.C. §1292(b) Certification Denied.** While acknowledging a split in the District of Minnesota, Judge Nelson denied plaintiffs' request to certify the issue of the standard of review applicable to a report and recommendation granting or denying a motion to conditionally certify a case under the FLSA, finding that she would have reached the same conclusion on the motion to certify no matter what standard of review applied. **Harris v. Chipotle Mexican Grill, Inc.**, 2014 WL 6388714 (D. Minn. 11/14/2014).

Judge Magnuson denied defendants' motion to certify under 28 U.S.C. §1292(b) in an insurance coverage dispute, finding no substantial ground for difference of opinion because his decision was not in conflict with other decisions addressing the same issues. **U.S. Bank N.A. v. Indian Harbor Ins. Co.**, 2014 WL 5243528 (D. Minn. 10/15/2014).

ADMINISTRATIVE ACTION

■ **Proposed Amendments to the Federal Rules of Appellate and Civil Procedure.**

Proposed amendments to the Federal Rules of Appellate Procedure have been published for public comment, and are likely to become effective on December 1, 2015. The proposed amendments that are likely to have the greatest impact for appellate practitioners would reduce word limits for main briefs from 14,000 to 12,500 words, and for reply briefs from 7,000 to 6,250 words (reductions of more than 10%), and would, for the first time, impose type-volume limits on a number of miscellaneous filings. Minor amendments to the Federal Rules of Civil Procedure are also pending. The proposed amendments are available at: <http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx>

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IMMIGRATION LAW

ADMINISTRATIVE ACTION

■ **President's Executive Actions: Deportation Priorities; Border Security; Temporary Stays.** On November 20, 2014, President Barack Obama announced a series of executive actions prioritizing the deportation of felons

over family members, enhancing border security, and allowing certain undocumented immigrants to temporarily stay in the United States provided they meet certain criteria. This includes among other things, "expanding the population eligible for the Deferred Action for Childhood Arrivals (DACA) program to young people who came to this country before turning 16 years old and have been present since January 1, 2010, and extending the period of DACA and work authorization from two years to three years"; "allowing parents of U.S. citizens and lawful permanent residents who have been present in the country since January 1, 2010, to request deferred action and employment for three years, in a new Deferred Action for Parental Accountability program, provided they pass required background checks"; and "expanding the use of provisional waivers of unlawful presence to include the spouses and sons and daughters of lawful permanent residents and the sons and daughters of U.S. citizens." More details about the implementation of these actions will be released over the coming months. <http://www.uscis.gov/immigrationaction/>



■ **Highly Skilled Foreign-born Workers.**

On November 20, 2014, Jeh Johnson, secretary of the Department of Homeland Security (DHS), issued a memorandum directing DHS to implement several policies and regulations "enabling businesses to hire and retain highly skilled foreign-born workers" while at the same time providing workers greater flexibility in career advancement and seeking opportunities elsewhere. These changes encompass modernization of the employment-based immigrant visa system, reformation of "Optional Practical Training" for foreign students and graduates from U.S. universities; promotion of research and development in the United States; and improvement in the consistency of the L-1B (intra-company transferee) visa program. http://www.dhs.gov/sites/default/files/publications/14_1120_memo_business_actions.pdf



■ **Guidance Regarding Race and Other Factors.**

On December 8, 2014, the U.S. Department of Justice released its revised *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity*. Federal law enforcement officers have been directed to avoid using such factors in making routine or spon-

aneous law enforcement decisions. All activities other than those encompassing routine or spontaneous decisions may involve consideration of such factors "only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons possessing a particular listed characteristic to an identified criminal incident, scheme, or organization, a threat to national or homeland security, a violation of [f]ederal immigration law, or an authorized intelligence activity." In order to rely on such factors, "law enforcement officers must also reasonably believe that the law enforcement, security, or intelligence activity to be undertaken is merited under the totality of the circumstances, such as any temporal exigency and the nature of any potential harm to be averted." <http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>



■ **Temporary Protected Status for Certain West African Nationals.**

On November 21, 2014, the secretary of homeland security designated the countries of Liberia, Sierra Leone, and Guinea for Temporary Protected Status (TPS) for an 18-month period running from November 21, 2014 through May 21, 2016. Nationals of those countries present in the United States on November 20, 2014 who meet certain other eligibility requirements may apply for the temporary relief afforded by the designation. The secretary is authorized to designate a foreign state for TPS if (s)he finds that it is "experiencing extraordinary and temporary conditions that prevent its nationals from returning in safety and that permitting such aliens [sic] to remain temporarily in the United States is not contrary to the national interest."

All three West African nations are currently battling the Ebola virus epidemic. Pertinent orders for the three countries can be found as follows: **Liberia:** 79 Fed. Reg. 69502-06 (11/21/2014). <http://www.gpo.gov/fdsys/pkg/FR-2014-11-21/html/2014-27772.htm>; **Sierra Leone:** 79 Fed. Reg. 69506-11 (11/21/2014). <http://www.gpo.gov/fdsys/pkg/FR-2014-11-21/html/2014-27778.htm>; **Guinea:** 79 Fed. Reg. 69511-15 (11/21/2014). <http://www.gpo.gov/fdsys/pkg/FR-2014-11-21/html/2014-27770.htm>



■ **Refugee/Parole Program for Certain Vulnerable Children.** On December 3, 2014, the U.S. Department of State announced a new refugee/

Notes&Trends

parole program for certain vulnerable children in El Salvador, Guatemala, and Honduras seeking to reunite with their parents who are lawfully present in the United States through either refugee processing or parole. The agency noted that the program will “provide a safe, legal, and orderly alternative to the dangerous journey that some children are currently undertaking to the United States.” <http://www.state.gov/r/pa/prs/ps/2014/12/234655.htm>



■ **Reciprocal Extensions of Short-term Visas for U.S., Chinese Citizens.** On November 12, 2014, the United States and the People’s Republic of China increased the validity of their short-term business and tourist visas as well as student and exchange visitor visas issued to the other nation’s citizens.

Both Chinese and U.S. applicants deemed eligible for the business and tourist nonimmigrant visa may now be issued multiple-entry visas for up to ten years for such travel. Additionally, students and exchange visitors (and their dependents) eligible for such visas may now be issued multiple-entry visas for up to five years or the length of their program. <http://www.state.gov/r/pa/prs/ps/2014/11/233904.htm>



■ **Enhanced Security for Visa Waiver Program.** On November 3, 2014, the secretary of homeland security announced that nationals of countries seeking entry into the United States through the Visa Waiver Program will be required to provide additional information when completing and submitting their application through the Electronic System for Travel Authorization (ESTA). “We are taking this step to enhance the security of the Visa Waiver Program, to learn more about travelers from countries from whom we do not require a visa.” <http://www.dhs.gov/news/2014/11/03/statement-secretary-johnson-security-enhancements-visa-waiver-program>



■ **Foreign Terrorist Organizations.** Upon review by Secretary of State John Kerry, both the Basque Fatherland and Liberty and National Liberation Army will continue to remain designated as Foreign Terrorist Organizations pursuant to Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189). 79 Fed. Reg. 65474 (11/04/2014). <http://www.gpo.gov/fdsys/pkg/FR-2014-11-04/pdf/2014-26186.pdf>

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H-1 Work Visa Quota Alert

Plan Now for 2015 Visas for Engineers, Scientists, Computer/IT Professionals

Employers should start NOW to prepare petitions for the limited supply of new H-1s subject to the 2015 quota. April 1, 2015 is the earliest possible new filing opportunity.



If the 2015 quota is missed, employers may be unable to obtain new H-1 work authorizations until October 2016.

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JUDICIAL LAW

■ **Terroristic Threats: Crime of Moral Turpitude.** The 8th Circuit Court of Appeals recently held the Board of Immigration Appeals correctly categorized the petitioner's offense of making terroristic threats in violation of Minn. Stat. §609.713 subd. 1 ("threaten[ing], directly or indirectly, to commit any crime of violence with purpose to terrorize another ... or in a reckless disregard of the risk of causing such terror") as a crime involving moral turpitude (CIMT) and thus did not err in concluding petitioner was ineligible for relief from removal. *Avendano v. Holder*, No. 13-2171, *slip op.* (8th Cir. 10/27/2014). <http://media.ca8.uscourts.gov/opndir/14/10/132171P.pdf>



■ **Due Process: Denying Petitioner Opportunity to Cross Examine Immigration Officer.** The 8th Circuit Court of Appeals held the immigration judge did not violate the petitioner's due process rights by admitting into evidence the Form I-213 (Record of Deportable Alien [sic]) or limiting his ability to cross-examine the immigration officer who prepared the I-213. "We have consistently stated that the federal rules of evidence do not apply to immigration proceedings ... and the sole test for the admissibility of evidence in removal proceedings is "whether the evidence is probative and its admission is fundamentally fair" ... [He has failed to show] that he was "actually prejudiced by any limitations on his ability to cross examine the immigration officer who prepared the Form I-213." *Chavez-Castillo v. Holder*, No. 14-1486, *slip op.* (8th Cir. 11/17/2014). <http://media.ca8.uscourts.gov/opndir/14/11/141486P.pdf>

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INTELLECTUAL
PROPERTY

JUDICIAL LAW

■ **Patent Damages: Remedies for Provisional Rights.** Magistrate Judge Brisbois recently denied a motion to compel discovery related to potential damages for provisional patent rights—35 U.S.C. §154(d)—because it was not pled separately in the complaint. Sorna is the owner of four patents, issued between 2011 and 2014, related to medical data recording systems. Sorna sued Pacsgear for infringement of the patents. A dispute arose over whether Pacsgear was required to disclose in discovery its actual knowledge of Sorna's published

patent *applications*: predicates for a claim to provisional-rights damages. The court held that Sorna was not entitled to compel disclosure of information relating to defendant's awareness of the patent applications, in contrast to knowledge of the issued patents. The court noted that Sorna did not allege a claim under 35 U.S.C. §154(d), which provides that a patentee may obtain a reasonable royalty from the date of publication of a patent application to the date the patent is issued, if the defendant had actual notice of the published patent application; the patent claims, as issued, are substantially the same as the claims in the patent application; and defendant infringed the patent. Sorna's claim of infringement was under 35 U.S.C. §271, but it requested damages pursuant to 35 U.S.C. §154(d) in its prayer for relief. However, the court held that a patentee is required to expressly plead a separate claim under 35 U.S.C. §154(d). The court denied the motion to compel because Sorna had not separately pled a claim for damages based on the applications, *i.e.*, provisional rights. *Sorna Corp. v. Pacsgear, Inc.*, No. 13-cv-2794 (D. Minn. 11/14/2014).



■ **Patent Infringement: Personal Jurisdiction; Nexus.** Judge Frank recently dismissed plaintiff's claims of patent infringement based on lack of personal jurisdiction. Plaintiff Hoo-Ahhs, a Minnesota company, sued Ira Green, a Rhode Island company, in the District of Minnesota. Hoo-Ahhs alleged that Ira Green was subject to both general and specific personal jurisdiction in Minnesota because it markets and offers for sale products to Minnesota residents through its website. Hoo-Ahhs further alleged that Ira Green could have anticipated being haled into court in Minnesota because it placed its products into the stream of commerce with the expectation that Minnesota residents will purchase the products; committed acts of patent infringement in Minnesota; and executed letters of intent to purchase plaintiff's business in Minnesota. However, the court found that defendant lacked the requisite minimum contacts with Minnesota. Ira Green did not have any place of business, office, or employee in Minnesota and is not registered to do business in Minnesota. Evidence showed that defendant's sales in Minnesota represented an extremely small percentage of defendant's sales for the same time period and were insufficient to qualify as continuous and systematic contacts. Further, Hoo-Ahhs' allegations regard-

ing the letters of intent did not support general personal jurisdiction because they were conclusory. There was also no specific personal jurisdiction because Hoo-Ahhs' complaint failed to allege particular facts showing that Ira Green purposefully directed its activities in Minnesota and that the alleged infringement arose out of those activities. Ira Green did not directly ship any products to Minnesota customers. *Hoo-Ahhs, LLC v. Ira Green, LLC*, 2014 U.S. Dist. LEXIS 161073 (D. Minn. 11/17/2014).

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PROBATE & TRUST LAW

JUDICIAL LAW

■ **Estate Planning: Alleged Attorney Negligence; SOL Bars Legal Malpractice Action.** Attorney was engaged in 1999 to provide estate planning advice. Pursuant to the representation, attorney drafted two trusts. Trustee alleged that attorney provided negligent advice on multiple occasions, which resulted in significant tax penalties, a protracted dispute with the IRS, and related damages. Trustee asserted that the representation continued until the end of September 2007, or potentially until October 29, 2007, when appellant hired new counsel. Trustee filed his legal malpractice complaint on September 6, 2013. The district court granted attorney's motion to dismiss the complaint for failure to state a claim upon which relief can be granted because it concluded trustee's claims were barred by the six-year statute of limitations applicable to legal malpractice actions.

The appellate court affirmed the district court. It concluded that the continuous-representation doctrine, which has not been explicitly applied in a published case in Minnesota to toll the statute of limitations in a legal-malpractice lawsuit, did not apply to the facts of this case. Trustee's complaint described multiple discrete instances tied to specific dates where damages were alleged to have been incurred as a result of attorney's faulty advice. The latest date of the allegedly faulty legal advice was September 13, 2006. Thus, the court found the statute of limitations expired September 13, 2012 and trustee's complaint was time-barred when filed on September 6, 2013. *Carlson v. Houk*, A14-0633, 2014 WL 6090685 (Minn. App. 11/17/2014) (unpublished). *Slip op.* at <http://mn.gov/lawlib/archive/ctapun/2014/opa140633-111714.pdf>