

## FEDERAL PRACTICE

### JUDICIAL LAW

#### ■ Summary judgment; new theory of liability not properly before the court.

Awarding one defendant summary judgment on a claim arising out of that defendant's alleged negligent inspection of a car tire, Judge Doty agreed with the defendant that the plaintiff's attempt to recharacterize her claim in opposition to the summary judgment motion could be disregarded where that theory had not been alleged in the complaint. *Sage ex rel. Sage v. Bridgestone Ams. Tires Ops., LLC*, 2021 WL 195797 (D. Minn. 1/20/2021).

#### ■ Fed. R. Civ. P. 12(b)(6); pleading the factual basis and legal theory for a claim.

Rejecting plaintiffs' "startling" argument that the pleading of the "factual basis" for their claims was sufficient to withstand a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), Judge Schiltz found that a plaintiff must also identify the legal right that was allegedly violated, that a complaint can be dismissed when it is based on an "unavailing" legal theory. *Viewpoint Neutrality Now! v. Regents of the Univ. of Minnesota*, 2021 WL 354130 (D. Minn. 2/2/2021).

#### ■ Class certification; questions relating to standing.

Noting a split among courts "across the United States, including courts within the District of Minnesota" regarding "whether and in what circumstances Article III standing issues may be postponed until after class certification" where class certification is "logically antecedent" to standing, Judge Wright deferred resolution of the question of whether the plaintiff had standing until the class-certification stage. *Gisairo v. Lenovo (United States) Inc.*, 2021 WL 352437 (D. Minn. 2/2/2021).

#### ■ Fed. R. Civ. P. 12(b)(6) AND 9(b); putative class action dismissed for lack of specificity.

Where the plaintiff brought a putative class action including claims for breach of warranty and fraud, but failed to allege, among other things: where he purchased the product; when he bought the product; how he had been misled; where he was misled; when he was misled; where he was damaged; and when he knew or had reason to know he was damaged, Judge Schiltz found that the plaintiff had not alleged a "single plausible claim" and dismissed the action without prejudice. *Ehllis v. DAP Prods., Inc.*, 2021 WL 83269 (D. Minn. 1/11/2021).

**■ Remand following transfer; procedures.** Where an action was filed in the Texas courts, removed to the Southern District of Texas on the basis of diversity jurisdiction, and then transferred to the District of Minnesota, where Judge Brasel rejected some defendants' partial motion to dismiss for fraudulent joinder and determined that diversity was lacking, Judge Brasel rejected those defendants' request that the action be "remanded" to the Minnesota courts, and found that the only appropriate court for remand was the Texas court where the case had been commenced. *Monty v. Patterson Dental Supply, Inc.*, 2021 WL 323868 (D. Minn. 2/1/2021).

#### ■ 28 U.S.C. §1447(c); untimely removal; remand; award of attorney's fees.

Where the defendant removed an action more than 17 months after the action was commenced, Chief Judge Tunheim rejected the defendant's argument that the removal was timely because the parties had been involved in related litigation in the Texas courts, found that the removal "lacked an objectively reasonable basis," remanded the action, and awarded the plaintiff attorney's fees in an amount to be determined. *Uptime Systems, LLC v. Kennard Law, P.C.*, 2021 WL 424470 (D. Minn. 2/8/2021).

#### ■ Behavior by multiple attorneys criticized; motion for sanctions denied.

Describing the case as a "mess," and criticizing plaintiff's counsel for a "kitchen sink approach in drafting their complaint," Judge Schiltz criticized counsel for both sides for their conduct during discovery, including "bickering like children during depositions," "one lawyer questioning the sanity of another," and one lawyer asking if the other lawyer wanted to "step out of the room" and "have a fight." Judge Schiltz admonished counsel for their behavior but denied the defendant's motion for Rule 11 sanctions, finding that both sides had made frivolous arguments. *ARP Wave, LLC v. Salpeter*, 2021 WL 168501 (D. Minn. 1/19/2021).

**■ Motion for sanctions denied.** Chief Judge Tunheim denied defendants' motion for sanctions under Fed. R. Civ. P. 11, 28 U.S.C. §1927 and the court's inherent powers, finding that sanctions were not warranted even though one of the plaintiff's claims "lack[ed] a reasonable basis in law and fact," and another claim was "meritless and lack[ed] a colorable basis," finding that all of the plaintiff's claims were within the bounds of Fed. R. Civ. P. 11(b). *Protege Biomed-*

*cal, LLC v. Duff & Phelps Secs., LLC*, 2021 WL 168467 (D. Minn. 1/19/2021).

**■ Fed. R. Civ. P. 26(e) AND 37(c)(1); motion for sanctions denied.** Where the plaintiff sought sanctions for one defendant's alleged untimely ninth supplemental interrogatory answer, Magistrate Judge Schultz found no evidence that the defendant had violated its duty to supplement under Fed. R. Civ. P. 26(e), denied sanctions pursuant to Fed. R. Civ. P. 37(c)(1), and ordered that the deposition of one witnesses be reopened on a limited number of topics. Noting that this was "at least" the seventh request for sanctions by the plaintiff, Magistrate Judge Schultz also cautioned both parties that any further motions for sanctions were likely to result in an award of attorney's fees to the prevailing party. *Fair Isaac Corp. v. Fed. Ins. Co.*, \_\_\_ F.R.D. \_\_\_ (D. Minn. 2021).

#### ■ Fed. R. Civ. P. 54(d)(1); costs; prevailing party; dismissal of federal claims.

Where the plaintiff's federal claims were dismissed on the merits, his supplemental claims were remanded, and the defendants filed a bill of costs, Judge Schiltz rejected the plaintiff's argument that the defendants were not prevailing parties, finding that the dismissal of the federal claims was sufficient to make them prevailing parties, and that the fact that defendants removed the case from state court did not alter that analysis. *Jacobs v. County of Hennepin*, 2021 WL 509284 (D. Minn. 2/11/2021).



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## IMMIGRATION LAW

### JUDICIAL LAW

#### ■ Denial of deferral of removal under

**CAT.** The 8th Circuit Court of Appeals affirmed the Board of Immigration Appeals' (BIA) decision denying the petitioner's request for deferral of removal under the Convention Against Torture (CAT) to Somalia, finding substantial evidence supported the immigration judge's and BIA's conclusions that he was unlikely to be tortured by Al-Shabaab due to his minority-clan membership. Furthermore, "the record does not show that the Somali government has willfully turned a blind eye to Al-Shabaab's activities. In fact, it shows the opposite. The Somali government is actively fighting to control Al-Shabaab,

has considerably reduced Al-Shabaab's military capacity, and has demonstrated a willingness to fight terrorism." *Has-san v. Rosen*, 19-2918, slip op. (8th Cir. 1/15/2021). <https://ecf.ca8.uscourts.gov/opndir/21/01/192918P.pdf>

■ **DHS allowed to substitute one charge (CIMTs) for another (immigration fraud) in removal proceedings.** The 8th Circuit Court of Appeals held that the Department of Homeland Security (DHS) may choose to rely on a charge involving the commission of crimes involving moral turpitude (CIMTs) rather than an alternative one encompassing immigration fraud. According to the court, "[t]he rules of procedure that govern removal proceedings in the immigration court allow the government to adjust the charges against an alien [sic] during the case. 'At any time during deportation or removal proceedings, additional or substituted charges of deportability... may be lodged' by the Department. 8 C.F.R. §1003.30; see also *id.* §1240.10(e)." *Herrera Gonzalez v. Rosen*, 19-2290, slip op. (8th Cir. 1/4/2021). <https://ecf.ca8.uscourts.gov/opndir/21/01/192290P.pdf>

■ **Motion to reopen removal proceedings on account of changed country conditions in Somalia is denied.** The 8th Circuit Court of Appeals upheld the Board of Immigration Appeals' (BIA) denial of the petitioner's motion to reopen his *in absentia* order of removal based on changed country conditions in Somalia. Finding the BIA did consider Al-Shabaab's increase in power and ISIS-Somalia's emergence and growing violence, the court concluded, however, that "no reasonable adjudicator" would surmise there was any material change in conditions from 2011 to 2018. *Mohamed v. Barr*, 19-3356, slip op. (8th Cir. 12/23/2020). <https://ecf.ca8.uscourts.gov/opndir/20/12/193356P.pdf>

ADMINISTRATIVE LAW

■ **Filing period for LRIF-based permanent residence applications extended to 12/20/2021.** On 1/12/2021, the Department of Homeland Security announced that the filing period for certain Liberian nationals and family members to apply for adjustment of status under the Liberian Refugee Immigration Fairness (LRIF) provision had been extended an additional year to 12/20/2021. <https://content.govdelivery.com/accounts/USDHS/bulletins/2b5dc64?reqfrom=share>

■ **Deferred enforced departure for Liberians extended to 6/30/2022.** On

1/20/2021, President Biden issued a memorandum reinstating and extending deferred enforced departure (DED) for Liberian nationals, or persons without nationality who last habitually resided in Liberia, to 6/30/2022, provided they were present in the United States and under a grant of DED as of 1/10/2021. **86 Fed. Register, 7055-57** (1/25/2021). <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01770.pdf>

■ **Extension and re-designation of TPS for Syria.** On 1/29/2021, Department of Homeland Security Acting Secretary Pekoske announced an 18-month extension and re-designation of Syria's temporary protected status (TPS). Current beneficiaries under Syria's TPS designation were deemed eligible to re-register for an extension of their status while those Syrians who entered the United States after 8/1/2016, and were otherwise eligible, would also be allowed to register for the first time. <https://www.dhs.gov/news/2021/01/29/acting-dhs-secretary-pekoske-extends-temporary-protected-status-syria>

■ **Deferred enforced departure for certain Venezuelans.** On 1/19/2021, President Trump issued a memorandum directing the Departments of Homeland Security and State to defer, with certain exceptions, for 18 months the removal of any Venezuelan national, or noncitizen without nationality who last habitually resided in Venezuela, who is present in the United States as of 1/20/2021. **86 Fed. Register, 6845-46** (1/25/2021). <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01718.pdf>

■ **Reaffirmation: The United States is a nation of immigrants.** On 2/2/2021, President Biden issued Executive Order 14012 (Restoring Faith in Our Legal

Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans), reaffirming our nation's character as one of opportunity and welcome. Noting that our nation is "enriched socially and economically by the presence of immigrants," the order declared that the federal government should develop welcoming strategies promoting integration, inclusion, and citizenship, while embracing, at the same time, full participation of the newest Americans in our democracy. The order directed, among other things, that both the Departments of State and Homeland Security review existing regulations, orders, guidance documents, policies, and other similar agency actions that may conflict with those policy objectives. **86 Fed. Register, 8277-80** (2/5/2021). <https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02563.pdf>



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INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **Copyright: Disputed ownership rights when works created by independent contractors.** Judge Tunheim recently granted in part Peakspeed, Inc.'s motion for preliminary injunction. In 2019, Timothy Emerson formed EmersonAI to develop geospatial applications for Field Programmable Gate Arrays (FPGA), in particular the application TrueView. By the end of 2019, Emerson's business advisor Dave Eaton wanted to create a new company to further develop TrueView. Peakspeed was formed. By mid-2020, Emerson felt he was being pushed out of Peakspeed. Emerson then allegedly

## SOCIAL SECURITY DISABILITY

### INITIAL APPLICATION THROUGH HEARING



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