

■ **Removal; refusal to identify members of limited liability company; remand.** Where the defendant removed the action on the basis of diversity jurisdiction, failed to identify its members or the members of the plaintiff limited liability company, and declined to comply with Magistrate Judge Micko's order that it identify the citizenship of both parties, Judge Schiltz accepted the defendant's "stipulation" and remanded the action to Ramsey County. *BevSource, LLC v. Innovation Ventures, LLC*, 2023 WL 5000262 (D. Minn. 8/4/2023).

■ **Attorney-client privilege; ERISA fiduciary exception.** Finding that the ERISA fiduciary exception applied, Magistrate Judge Docherty granted the plaintiff's motion to compel the production of documents listed on the defendant's privilege log where the defendant was unable to establish that an "adversarial relationship" existed at the time the documents were created. *Hardy v. Unum Life Ins. Co. of Am.*, 2023 WL 4841952 (D. Minn. 7/28/2023).

■ **Fed. R. Civ. P. 34(b)(2); defendants required to disclose whether they are withholding documents.** Where defendants asserted objections to multiple document requests but were "postponing" disclosing whether they were withholding documents based on those objections, Magistrate Judge Docherty cited Fed. R. Civ. P. 34(b)(2) and ordered defendants to supplement their responses to comply with the rule. *Smartmatic USA Corp. v. Lindell*, 2023 WL 4882865 (D. Minn. 8/1/2023).

■ **28 U.S.C. §1292(b); several requests for interlocutory appeals denied.** Determining that the plaintiff had not met its "heavy burden" to

establish any of the three elements required to justify an interlocutory appeal, Judge Wright denied its requests to have an issue certified for appeal pursuant to 28 U.S.C. §1292(b). *Berkley Regional Ins. Co. v. John Doe Battery Manuf.*, 2023 WL 4864277 (D. Minn. 7/31/2023).

Judge Tunheim also denied a request to certify a ruling for interlocutory appeal, finding, among other things, that a single intra-district split did not "rise to the level of substantial disagreement" regarding a controlling question of law. *Varela v. State Farm Mut. Auto. Ins. Co.*, 2023 WL 5021182 (D. Minn. 8/7/2023).

■ **Ex parte motions to serve third-party subpoenas granted with conditions.** Magistrate Judge Foster again granted the plaintiff's motion for leave to serve subpoenas prior to a Rule 24(f) conference after applying the so-called *Arista Records* test and finding "good cause," but also imposed a "limited protective order" intended to protect the rights of the John Doe defendants. *Strike 3 Holdings, LLC v. Doe*, 2023 WL 4864279 (D. Minn. 7/31/2023).

ADMINISTRATIVE ACTION

■ **Proposed federal rules amendments.** Proposed amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure are currently wending their way through the system.

Of particular interest to federal practitioners are proposed amendments to Fed. R. Civ. P. 16 and 26, which would require the parties to address procedures relating to privilege logs in their Rule 26(f) report, and would similarly require the court to address privilege log procedures in the pretrial scheduling order.

Written comments on these proposed amendments are due no later than 2/16/2024.



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Immigration Law JUDICIAL LAW

■ **Completed Hobbs Act robbery is a "crime of violence" Under INA §101(a)(43)(F).** In August the 8th Circuit Court of Appeals held that the petitioner, who pled guilty to one count of Hobbs Act robbery and spent five years in prison, was removable because a completed Hobbs Act robbery is a "crime of violence." The court noted, "Any [foreign national] 'convicted of an aggravated felony is removable from the United States.' *Id.*; see 8 U.S.C. §1227(a)(2)(A)(iii). The list of qualifying aggravated felonies includes 'crime[s] of violence'—offenses that have 'as an element the use, attempted use, or threatened use of physical force against the person or property of another.' 18 U.S.C. §16(a); see 8 U.S.C. §1101(a)(43)(F)." *Green v. Garland*, No. 22-2335, *slip op.* (8th Circuit, 8/16/2023). <https://ecf.ca8.uscourts.gov/opndir/23/08/222335P.pdf>

■ **Motion for reconsideration automatically terminated voluntary departure grant from previous removal proceeding.** In July the 8th Circuit Court of Appeals held that the Board of Immigration Appeals (BIA) did not abuse its discretion when it denied the Mongolian petitioners' motion for reconsideration. According to the court, the filing of their motion to reconsider, prior to the end of their voluntary departure period, automatically terminated the grant of voluntary depart-

ture issued in their previous removal proceeding. 8 C.F.R. §1240.26(e)(1). *Bekhat v. Garland*, No. 22-2379, *slip op.* (8th Circuit, 7/27/2023). <http://media.ca8.uscourts.gov/opndir/23/07/222379P.pdf>

■ **Nebraska convictions for shoplifting not aggravated felonies.** On 7/13/2023, the 8th Circuit Court of Appeals held the Board of Immigration Appeals (BIA) committed error when it found the South Sudanese petitioner was removable for committing a theft offense—constituting an aggravated felony—based upon his Nebraska shoplifting convictions. According to the court, the Nebraska statute of conviction was broader than the generic federal offense and thus rendered the BIA's decision erroneous. "Because an offender can be convicted under Nebraska's shoplifting statute when he acts with an intent not encompassed by a generic theft offense, we hold that the statute sweeps more broadly than the generic federal offense." *Thok v. Garland*, No. 22-2508, *slip op.* (8th Circuit, 7/13/2023). <https://ecf.ca8.uscourts.gov/opndir/23/07/222508P.pdf>

■ **No actual prejudice shown in motion for reconsideration based on a due process claim.** On 7/13/2023, the 8th Circuit Court of Appeals held that the Board of Immigration Appeals (BIA) did not abuse its discretion when it denied the Mexican petitioner's motion for reconsideration based on a due process claim, given his failure to show actual prejudice. It further found the Board's application of the wrong legal standard to the petitioner's motion to reopen was immaterial since it applied a less-stringent standard. *Arroyo-Sosa v. Garland*, Nos. 22-1334, 22-2593, *slip op.* (8th Circuit, 7/13/2023).

<https://ecf.ca8.uscourts.gov/opndir/23/07/221334P.pdf>

■ **Failure to show membership in any of proposed social groups.** On 7/6/2023, the 8th Circuit Court of Appeals upheld the denial of asylum and related relief to the Mexican petitioner, finding that the Board of Immigration Appeals (BIA) did not commit error when it concluded none of the petitioner's 12 proposed particular social groups (PSGs) was cognizable for asylum purposes: (1) cattle ranchers and farmers in Mexico; (2) landowners in Mexico; (3) business owners in Mexico; (4) family of cattle ranchers and farmers in Mexico; (5) family of landowners in Mexico; (6) family of business owners in Mexico; (7) the Uriostegui family; (8) the Uriostegui-Teran family; (9) family of Juan Uriostegui Jimenez; (10) family of gang kidnapping victims; (11) family of gang extortion victims; and (12) deported Americanized Mexicans/ponchos. *Uriostegui-Teran v. Garland*, No. 22-2472, slip op. (8th Circuit, 7/6/2023). <https://ecf.ca8.uscourts.gov/opndir/23/07/222472P.pdf>

ADMINISTRATIVE ACTION

■ DHS notices extending and redesignating TPS.

South Sudan: On 8/21/2023, the U.S. Department of Homeland Security (DHS) announced the extension of the designation of South Sudan for temporary protected status (TPS) for 18 months, from 11/4/2023 through 5/3/2025. Those wishing to extend their TPS must re-register during the 60-day period running from 9/6/2023 through 11/6/2023. The secretary also redesignated South Sudan for TPS, allowing additional South Sudanese to apply who

have continuously resided in the United States since 9/4/2023 and have been continuously physically present in the United States since 11/4/2023. The registration period for these new applicants runs from 9/6/2023 through 5/3/2025. **88 Fed. Reg. 60971-79** (2023). <https://www.govinfo.gov/content/pkg/FR-2023-09-06/pdf/2023-19312.pdf>

Ukraine: On 8/21/2023, the U.S. Department of Homeland Security (DHS) announced the extension of the designation of Ukraine for temporary protected status (TPS) for 18 months, from 10/20/2023 through 4/19/2025. Those wishing to extend their TPS must re-register during the 60-day period running from 8/21/2023 through 10/20/2023. The secretary also redesignated Ukraine for TPS, allowing additional Ukrainians to apply who have continuously resided in the United States since 8/16/2023 and have been continuously physically present in the United States since 10/20/2023. The registration period for these new applicants runs from 8/21/2023 through 4/19/2025. **88 Fed. Reg. 56872-80** (2023). <https://www.govinfo.gov/content/pkg/FR-2023-08-21/pdf/2023-17875.pdf>

Sudan: On 8/21/2023, the U.S. Department of Homeland Security (DHS) announced the extension of the designation of Sudan for temporary protected status (TPS) for 18 months, from 10/20/2023 through 4/19/2025. Those wishing to extend their TPS must re-register during the 60-day period running from 8/21/2023 through 10/20/2023. The secretary also redesignated Sudan for TPS, allowing additional Sudanese to apply who have continuously resided in the United States since 8/16/2023 and have been continuously physically pres-

ent in the United States since 10/20/2023. The registration period for these new applicants runs from 8/21/2023 through 4/19/2025. **88 Fed. Reg. 56864-72** (2023). <https://www.govinfo.gov/content/pkg/FR-2023-08-21/pdf/2023-17877.pdf>

■ DHS issues fact sheet: Family reunification parole processes for El Salvador, Guatemala, Honduras, Colombia, Cuba, and Haiti.

On 8/7/2023, the Department of Homeland Security (DHS) issued a fact sheet on the new family reunification parole (FRP) processes for El Salvador, Guatemala, Honduras, and Colombia, and the updated family reunification parole processes for Cuba and Haiti. This process makes it easier for eligible individuals to reunite with family in the United States, “the latest example of the U.S. effort to expand lawful pathways and offer alternatives to dangerous and irregular migration.” Key features of this process include the following:

- 1) Certain nationals of those countries who are beneficiaries of an approved relative petition may be eligible for parole into the United States, provided they are outside the United States, meet all requirements (including screening, vetting, and medical requirements), and not already issued an immigrant visa.
- 2) They may be considered on a case-by-case basis for a period of up to three years while applying to become a lawful permanent resident on the basis of their approved relative petition.
- 3) The U.S. government will deliver timely and efficient authorization for those approved and vetted to travel with those paroled into the United States eligible to apply for employment authorization.

- 4) The process commences with the Department of State issuing an invitation to the U.S. citizen or lawful permanent resident whose relative petition has been approved for a beneficiary (i.e., a family member from Colombia, El Salvador, Guatemala, or Honduras).
- 5) Only an invited U.S. citizen or lawful permanent resident petitioner may initiate the process by filing a request on behalf of the beneficiary and their eligible family members to be considered for advance travel authorization and parole.
- 6) Once the beneficiary's priority date becomes current (i.e., an immigrant visa becomes available), the beneficiary may apply for permanent residence through adjustment of status while in the United States.
- 7) Noncitizens who fail to use this process or another lawful, safe, and orderly pathway by attempting to enter the United States unlawfully will be subject to severe consequences, including, for example, removal, a minimum five-year bar on admission, and potential criminal prosecution for unlawful reentry.

■ **USCIS announces new version of Form I-9.** On 7/25/2023, U.S. Citizenship and Immigration Services (USCIS) announced the introduction of a new version of Form I-9, Employment Eligibility Verification. Several changes were made to the form, including a checkbox indicating an employee's Form I-9 documentation was examined using a DHS-authorized alternative procedure. The new version of Form I-9 was made available for use on 8/1/2023. The previous version of Form I-9 (version date: 10/21/2019) will continue to be allowed for use through 10/31/2023. **88 Fed. Reg. 47891-92** (2023).

For more on the optional alternatives to the in-person physical document examination method for Form I-9, see **88 Fed. Reg. 47749-54** (2023) and **88 Fed. Reg. 47990-48022** (2023).



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Indian Law JUDICIAL LAW

■ **The Parental Kidnapping Prevention Act does not apply to Indian tribes.** Following a North Dakota state-court decision granting parents interim shared custody of a child enrolled in the Cheyenne River Sioux Tribe, the tribal-member mother brought the child from North Dakota to the Cheyenne River Indian Reservation in South Dakota without court approval or notification to the non-Indian father. Following the mother's arrest and detention for parental kidnapping and custody-order violations, the tribal court assumed jurisdiction and placed the child with another relative. The father appealed that decision, arguing that the Parental Kidnapping Prevention Act required the tribal court to recognize the first-in-time North Dakota state custody orders. After a string of remands, appeals, and proceedings in tribal, state, and federal courts, the 8th Circuit reviewed the language of the Act and held, in a matter of first impression in the Circuit, that the Act does not apply to Indian tribes (and thus the tribal court did not need to follow its terms) because it does not specifically reference Indian tribes in the full-faith-and-credit provisions. *Nygaard v. Taylor*, ___ F.4th ___, 2023 WL 5211646 (8th Cir. 2023).



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Tax Law JUDICIAL LAW

■ **Hospitalization did not excuse untimely disclosure; experts excluded.** The defendant in this property tax dispute failed to disclose several experts by the scheduling order deadline. He claimed an unexpected hospitalization caused the delay and asked the court to serve the experts out of time. The court refused, explaining that under the six criteria laid out in *Dennie*, the circumstances still warranted suppressing the expert testimony. *Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 406 (Minn. 1986). Notable factors included that defendant did not disclose one expert's retention until 129 days after the last permissible date for disclosure, and the counsel for the defendant had had their expert witnesses excluded before by this very court, so was already "on notice at the time concerning the importance of timely expert witness disclosures." *Bradley v. Cnty. of Hennepin*, No. 27-CV-21-5224, 2023 WL 5340024 (Minn. Tax 8/18/2023).

■ **Counsel's unreasonable and vexatious actions justified sanctions.** In *LakePoint Land II, LLC v. Comm'r of Internal Revenue*, both parties submitted motions for reconsideration on the tax court's previous partial summary judgment order as well as a motion to impose sanctions submitted by the petitioner.

In the previous order, the court granted partial summary judgment in favor of the respondent. Respondent had sought favorable adjudication on compliance with §6751(b)(1), written supervisory approval requirements, for penalties asserted under §6662(a). Section 6751(b)(1) states that "[n]o penalty under this title shall be assessed

unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor." U.S.C.A. §6751(b)(1). "Furthermore, section 6751(b)(1) does not require approval to be indicated by a wet signature, nor any particular form of signature; rather, respondent need only show written evidence that timely supervisory approval was obtained."

The petitioner's motion for reconsideration was granted, the respondent's denied, and the previous order was vacated upon review of previously unavailable evidence. The previous order relied in part upon a penalty consideration lead sheet filed in July 2016. The July lead sheet contained all the penalties eventually used in petitioner's final partnership administrative adjustment. After the order was granted, it was established by the petitioner, and then agreed to by both parties, that the July lead sheet had been backdated. Given that the July lead sheet had demonstrated the requisite supervisory approval, the court concluded it had made its decision on erroneous evidence.

The petitioner had additionally filed a motion to impose sanctions requesting (1) the court award reasonable expenses incurred as a result of the respondent's misconduct and (2) for the court to decide adversely against the respondent's section 6751(b) written supervisory approval of penalties issue. Upon further review of the newly developed record, the court determined that respondent's counsel was told regarding the July lead sheet that "I am not sure that the typed in date... was accurate." Upon this development, the court determined that respondent's counsel knew or should have known his representation lacked candor and previous declarations by the respondent to the court were false.

The court stated the respondent's counsel failed to meet his ongoing obligations to correct misrepresentations under ABA Model Rule 3.3.

Holding the determination of fees and costs until after trial, the court granted in part the petitioner's motion to impose sanctions. The court concluded that the respondent's counsel's actions unreasonably and vexatiously multiplied the proceedings in the case and the respondent would be liable for the multiplication. The court, however, found that granting the adverse ruling on written supervisory approval penalties requested by the petitioner would be inappropriate in the case. *LakePoint Land II, LLC v. Comm'r of Internal Revenue*, T.C.M. (RIA) 2023-111 (T.C. 2023).

■ **Court "unimpressed" with "common practices" arising from covid administrative constraints.** A single issue was before the court in *Channels, Inc. v. Comm'r of Internal Revenue*: "whether the Court should strike the parties' revised Proposed Stipulated Decision" after the court found discrepancies between the taxpayer's answer notice and status report notice. Upon an order to explain the discrepancies, the taxpayer's counselors explained that as a result of the constraints imposed by covid, the counselors did not possess the physical administrative files of the case. They attempted to reconstruct a complete and accurate copy of their client's notice of deficiency. A counselor used the first page of an incomplete copy of the notice of deficiency, which was stamped as "ORIGINAL," and a draft version of the notice to create their answer. Counselors contended that "it became a 'common practice to reconstruct the SNOD [statutory notice of deficiency]" because of the covid-19 pandemic. The court