needed $1,000 per month in maintenance after imputing income to her from full-time employment. The court of appeals reversed and remanded so the district court could recalculate the parties' monthly expenses, evaluate the duration of maintenance, and reconsider the immediacy of its imputation of income to wife.

Another issue on appeal was the district court's denial of wife's request that husband be ordered to maintain life insurance to secure her maintenance award. The district court had concluded that such a requirement was reserved for exceptional cases. The court of appeals reversed, citing its decision in *Kampf v. Kampf*, 732 N.W.2d 630 (Minn. Ct. App. 2007), which explained that the old "exceptional-case standard" had been eliminated by statutory changes in 1985. On remand, the district court was to consider the *Kampf* factors in deciding whether to impose a life insurance obligation. ***Reis v. Hallberg***, A15-1032, 5/9/2016.

– Jaime Driggs
Henson & Efron PA
jdriggs@hensonefron.com

FEDERAL PRACTICE

JUDICIAL LAW

■ **FLSA class action; common questions of law or fact; use of representative sample.** The Supreme Court approved of the use of representative samples to establish common questions or law or fact in an FLSA class action. ***Tyson Foods, Inc. v. Bouaphakeo***, 136 S. Ct. 1036 (2016).

■ **TCPA; "ascertainability" of class members; commonality and predominance.** The 8th Circuit held that where the membership of a proposed class of fax spam recipients was "clearly ascertainable," and commonality and predominance requirements were also met, Judge Doty had abused his discretion in declining to certify a plaintiff class of fax recipients. ***Sandusky Wellness Center, LLC v. MedTox Scientific, Inc.***, ___ F.3d ___ (8th Cir. 2016).

■ **28 U.S.C. §1782; discovery in aid of a foreign proceeding.** Affirming an order by Judge Nelson, the 8th Circuit found that the likely availability of discovery in the underlying German action and the "sensitive nature" of the information sought outweighed the likely admissibility in Germany of the discovery sought in the district court, and that Judge Nelson had not abused her discretion in declining to order the production of the requested discovery under 28 U.S.C. §1782. ***Andover Healthcare, Inc. v. 3M Co.***, ___ F.3d ___ (8th Cir. 2016).

■ **Notice of appeal; Fed. R. App. P. 3(c)(1)(b); failure to identify order appealed from.** Where Judge Nelson granted summary judgment to one defendant, the second defendant later settled and the plaintiff's claims against the second defendant were dismissed with prejudice, meaning that the summary judgment against the first defendant automatically became a final judgment, and because the plaintiff's notice of appeal identified one order but failed to identify the summary judgment order, the 8th Circuit held that it lacked jurisdiction to review the district court's summary judgment order. ***Rosillo v. Holten***, ___ F.3d ___ (8th Cir. 2016).

■ **Fed. R. Civ. P. 54(b); single-claim action; no appellate jurisdiction.** Where a district court purported to certify the only claim in an action for immediate appeal under Fed. R. Civ. P. 54(b), the 8th Circuit found that Rule 54(b) does not apply to a "single-claim action," and dismissed the appeal for lack of jurisdiction. ***Johnson v. Lombardi***, 815 F.3d 451 (8th Cir. 2016).

■ **Unaccepted offer of judgment does not moot class claims.** Earlier this year, this column noted the Supreme Court's decision in *Campbell-Ewald Co. v. Gomez*, which held that an unaccepted offer of judgment does not moot putative class action claims, but also hinted that the outcome might be different "if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount."

In April 2016, this column noted Magistrate Judge Noel's rejection of a defendant's attempt to deposit funds with the court in an attempt to moot a putative class action. Since then, Judge Montgomery overruled the defendant's objection to Magistrate Judge Noel's order, finding "no clear error" in that order. ***Boris Yaakov of Spring Valley v. Varitronics, LLC***, 2016 WL 806703 (D. Minn. Mar. 1, 2016), *aff'd*, 2016 WL 1735815 (D. Minn. 5/2/2016).

■ **Removal and remand; multiple cases.** Judge Doty granted the plaintiff's motion to remand an action removed on the basis of diversity jurisdiction to the Minnesota courts where a forum selection clause designated Le Sueur County, Minnesota as the only venue for resolution of disputes. ***Cambria Co. v. Renaissance Marble & Tile, Inc.***, 2016 WL 1706101 (D. Minn. 4/28/2016).

Judge Tunheim denied the plaintiff's motion to remand a removed action to the Minnesota courts, finding that the corporate defendant was not a "closely-related party," bound by the Minnesota state court forum selection clause in the individual defendant's employment agreement, and that the individual defendant's inability to consent to the removal was irrelevant where the removal was completed before the individual defendant had been served. ***Medtronic, Inc. v. Ernst***, 2016 WL 1651801 (D. Minn. 4/26/2016).

■ **Motion to dismiss or transfer denied; 28 U.S.C. §1391(b)(2); location of "events or omissions."** Judge Tunheim denied a motion to dismiss or transfer product liability and warranty claims on the basis of alleged improper venue, finding that to accept the corporate defendants' argument that the "events or omissions" underlying the plaintiffs' claims occurred exclusively at the defendants' headquarters (meaning that plaintiffs could not pursue their claims anywhere else), was "plainly not the law." ***Luckey v. Alside, Inc.***, 2016 WL 1559569 (D. Minn. 4/18/2016).

– Josh Jacobson
Law Office of Josh Jacobson
jacobsonlawoffice@att.net

IMMIGRATION LAW

JUDICIAL LAW

■ **Asylum denied for Mexican family fearing gang persecution.** The 8th Circuit Court of Appeals held that petitioners, claiming persecution at the hands of the Matazetas gang if they returned to Mexico, failed to show the government of Mexico either condoned the gang's conduct or was unable to protect its victims. ***Saldana v. Lynch***, No. 15-1226, *slip op.* (8th Cir. 4/28/2016). *http://media.ca8.uscourts.gov/opndir/16/04/151226P.pdf*

■ **Submission of I-751 petition constituted an act furthering marriage fraud conspiracy.** The 8th Circuit Court of Appeals held the petitioner's submission of an I-751 petition (to remove conditions on permanent residence) constituted an overt act furthering a conspiracy to commit marriage fraud, thereby extending his crime to a date within five years of his admission to the United States. ***Ashraf v. Lynch***, No. 14-3179, *slip op.* (8th Cir. 4/22/2016). *http://media.ca8.uscourts.gov/opndir/16/04/143179P.pdf*

■ **Petitioner's domestic assault convictions are not categorically crimes involving moral turpitude (CIMT).** The 8th Circuit Court of Appeals held that the Board of Immigration Appeals (BIA) committed error when it declined to review the petitioner's record of convictions for domestic abuse assault under the modified categorical approach in order to determine whether he had been convicted under a subsection describing a CIMT. "[A]ll four of Perez's convictions under Iowa Code Annotated §708.2A, including his third and fourth convictions under the §708.2A(4)'s recidivist provision, are dependent upon the definition of 'assault' in §708.1(2)." "Because [§708.1] is divisible into discrete subsections of turpitudinous acts and non-turpitudinous acts," Perez's domestic-abuse assault convictions do not *categorically* constitute CIMTs. See *Cisneros-Guerrerro v. Holder*, 774 F.3d 1056, 1061 (5th Cir. 2014). ***Perez Alonzo v. Lynch***, No. 15-2024, *slip op.* (8th Cir. 4/22/2016). *http://media.ca8.uscourts.gov/opndir/16/04/152024P.pdf*

■ **Years-old past events failed to provide an objectively reasonable basis for present fear of persecution.** The 8th Circuit Court of Appeals held that the petitioner failed to show how threats made by Guatemalan guerrillas in 1992, 1997, and 2006 provided an objectively reasonable basis for a present fear of particularized persecution on account of his political opinion. Nor, for that matter, did his claimed group membership, "Guatemalan repatriates who have lived and worked in the United States for many years and are perceived to be wealthy." It does not qualify as a socially distinct, sufficiently particular social group. Finally, changes in Guatemala's conditions increased the likelihood that the petitioner could safely relocate to another part of the country. ***Cinto-Velasquez v. Lynch***, No. 15-1198, *slip op.* (8th Cir. 3/25/2016). *http://media.ca8.uscourts.gov/opndir/16/03/151198P.pdf*

■ **District court's denial of naturalization petitions was appropriate when petitioner-husband worked without authorization.** The 8th Circuit Court of Appeals held the district court did not err when it denied the naturalization petitions of the petitioners, an Iraqi religious worker and his wife, on the ground that the husband violated the terms of his visa by accepting employment and working before receiving authorization to do so. ***Al-Saadoon v. Lynch***, No. 14-3807, *slip op.* (8th Cir. 3/14/2016). *http://media.ca8.uscourts.gov/opndir/16/03/143807P.pdf*

■ **Conviction for crime of moral turpitude still exists since petitioner failed to show it was vacated for non-immigration reasons.** The 8th Circuit Court of Appeals upheld the Board of Immigration Appeal's finding that the petitioner failed to prove his state court conviction for theft in the fourth degree, a crime involving moral turpitude, was vacated for a substantive or procedural reason rather than for immigration purposes. "This conviction still qualified as a crime involving moral turpitude because Andrade-Zamora had not met his burden to prove the conviction was vacated on the merits, rather than for immigration purposes." ***Andrade-Zamora v. Lynch***, No. 15-2004, *slip op.* (8th Cir. 2/26/2016). *http://media.ca8.uscourts.gov/opndir/16/02/152004P.pdf*

ADMINISTRATIVE ACTION

■ **USCIS designates Matter of H.V.P. as an adopted decision.** On 3/9/2016, U.S. Citizenship and Immigration Services issued a policy memorandum adopting an Administrative Appeals Office (AAO) decision, *Matter of H.V.P.,* providing guidance to USCIS employees reviewing and issuing decisions in cases similar to *H.V.P.* The case clarifies that medical specialists, in addition to primary care physicians, may be eligible for the physician national interest waiver under section 203(b)(2)(B)(ii) of the Immigration and Nationality Act if they agree to practice in an area designated by the Secretary of Health and Human Services as having a shortage of health care professionals. *https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2016/Matter_of_H-V-P-_Adopted_Decision_2016-01.pdf_-_Adobe_Acrobat.pdf*

■ **CBP announces e-Passport requirement for visa waiver program.** On 5/9/2016, CBP announced that under the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Visa Waiver Program (VWP) travelers traveling to the United States with an Electronic System for Travel Authorization (ESTA) must have an e-Passport as of 4/1/2016. The agency noted that travelers from VWP countries may still travel to the United States without an e-Passport provided they have a valid nonimmigrant visa issued by a U.S. Embassy or Consulate. *https://www.cbp.gov/newsroom/national-media-release/2016-05-09-000000/clarifying-e-passport-requirement-visa-waiver*

– R. Mark Frey
Frey Law Office
rmfrey@cs.com

INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **Patent infringement: Summary judgment granted.** Judge Montgomery recently granted defendant's motion for summary judgment on claims of patent infringement, along with other claims. Plaintiff LTJ Enterprises (LTJ) developed and patented the LevAlert, a device to measure the amount of material in a bin from the outside. Defendant Custom Marketing Co. (CMC) was LTJ's preferred seller of the LevAlert for almost a decade before the business relationship soured. CMC then developed a competing device called the Grain Gauge. LTJ sued CMC for patent infringement. The claims at issue were written in means-plus-function form. The scope of a means-plus-function claim includes all of the structures and materials found in the patent specification and their equivalents that perform the function stated in the patent claim. The claim recited "a gear drive" and "a generally linear teeth or rack on guide member." The court found that the Grain Gauge lacked a "guide member" or any corresponding structure. Therefore, the Grain Gauge did not literally infringe LTJ's patent. Furthermore, the court found that the Grain Gauge did not infringe the patent under the doctrine of equivalents, an infringement theory where a device differs from the literal meaning of the claim terms only by insubstantial differences. The court noted that while the means-plus-function equivalence test is similar to the doctrine of equivalence test, the two tests are not coextensive. The court found that because there was not a corresponding structure to prove literal infringement under means-plus-function, there also could not be a corresponding structure to prove infringement under the doctrine of equivalence. ***LTJ Enters. v. Custom Mktg. Co., LLC***, No. 13-2224 ADM/LIB, 2016 U.S. Dist. LEXIS 31661 (D. Minn. 3/10/2016).

■ **Trademark infringement: Summary judgment granted.** Judge Montgomery also recently granted CMC's motion for summary judgment on LTJ's claims of trademark infringement. After the business relationship deteriorated, CMC developed its own device known as the Grain Gauge. LTJ sued CMC for trademark infringement based on CMC's use of the LevAlert mark at a trade show. Although the court found that LevAlert was a strong mark and there was a high degree of competition between LevAlert and Grain Gauge, the other factors favored a finding of non-infringement. The court found CMC's use of LevAlert constituted "permissible comparative advertising." The court further found there was little similarity between the marks in sight, sound, or meaning; there was no intent to trade on LevAlert's goodwill; and the conditions of purchase required sophisticated buyers who would not be confused. Therefore, CMC did not infringe LTJ's trademark. ***LTJ Enters. v. Custom Mktg. Co., LLC***, No. 13-2224 ADM/LIB, 2016 U.S. Dist. LEXIS 31661 (D. Minn. 3/10/2016).

– Tony Zeuli & Joe Dubis
Merchant & Gould
tzeuli@merchantgould.com

PROBATE & TRUST LAW

ADMINISTRATIVE ACTION

■ **First Forms 8971 due 6/30.** After two delayed due dates, the first statements reporting the basis of distributed estate property pursuant to section 6035 are due 6/30/2016. Section 6035 was created under the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 and enacted 7/31/2015. The purpose of the law is to ensure consistent basis reporting between estates and beneficiaries who receive estate property. The basis reporting requirements apply to estates that are required to file a federal estate tax return after 7/31/2015. For these estates, the executor must file a Form 8971 and related Schedule(s) A with the IRS and provide each beneficiary listed on Form 8971 with a copy of that beneficiary's Schedule A. The June 30 due date applies to all Forms 8971 required to be filed with the IRS and all Schedules A required to be provided to beneficiaries after 7/31/2015, and before 6/30/2016. Going forward, Form 8971 and related Schedule(s) A are due no later than the earlier of (a) 30 days after the date the estate tax return is required to be filed (including extensions); and (b) 30 days after the date the estate tax return is actually filed with the IRS. Instructions for Form 8971 and Schedule A can be found at: *https://www.irs.gov/pub/irs-pdf/i8971.pdf*

■ **IRS confirms automatic six-month filing extension applies to federal estate tax returns filed solely to elect portability.** Some commentators had speculated that the six-month automatic extension of time to file a federal estate tax return may not apply to returns filed solely for the purpose of electing portability. The IRS ended any debate through the