were unique to individual class members, making the matter inappropriate for class certification. ***Ung v. Universal Acceptance Corp.***, ___ F.R.D. ___ (D. Minn. 2017).

■ **Fed. R. Civ. P. 12(b)(1); failure to assert any basis for court's jurisdiction.** Judge Frank dismissed an action without prejudice where the plaintiffs' complaint failed to assert any basis for the court's jurisdiction. ***Schwab v. Colvin***, 2017 WL 401939 (D. Minn. 1/30/2017).

■ **Fed. R. Civ. P. 55(b); default judgment vacated; "sum certain."** Judge Wright vacated a default judgment entered by the clerk pursuant to Fed. R. Civ. P. 55(b)(1), finding that the plaintiff could not establish that it was entitled to a "sum certain," and that the defendants had a "mitigating reason"—health—for their delay in answering the complaint. ***AGCO Finance, LLC v. Littrell***, ___ F. Supp. 3d ___ (D. Minn. 2017).

■ **Attempt to amend complaint in memorandum rejected.** Granting the defendants' motion to dismiss, Judge Magnuson rejected the plaintiff's attempt to assert a new claim in her memorandum in opposition to the motion, finding that "a plaintiff may not amend a complaint through a memorandum or brief." ***Vo v. Tritten***, 2017 WL 374906 (D. Minn. 1/26/2017).

■ **Motion to remand granted; attempt to avoid forum defendant rule rejected.** Adopting a report and recommendation by Magistrate Judge Rau, Judge Schiltz remanded an action to the Minnesota courts, relying on the so-called "forum defendant rule," and rejecting the defendant's late-found attempt to establish that he was not, in fact, a Minnesota citizen. ***Deutsche Bank Nat'l Trust Co. v. Abed***, 2017 WL 385040 (D. Minn. 1/27/2017).

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IMMIGRATION LAW

JUDICIAL LAW

■ **White House Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States; timeline and analysis.**
On January 27, 2017, President Donald J. Trump issued an executive order, "Protecting the Nation From Foreign Terrorist Entry Into the United States," that addressed a number of issues devoted to immigrants and immigration. Pertinent sections included:

- Section 3(c): Suspending entry for 90 days of immigrants and nonimmigrants from the countries of Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen (with the exception of those traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas).
- Section 5(a): Suspending the operation of the U.S. Refugee Admissions Program (USRAP) for 120 days in order to allow extensive review of the application and adjudication process.
- Section 5(b): Upon resumption of USRAP admissions, "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality."
- Section 5(c): Suspending entry of Syrian refugees indefinitely—"until such time as I have determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest."
- Section 5(d): Restricting entry of refugees to 50,000 individuals for fiscal year 2017, allowing additional admissions when it is determined "that additional admissions would be in the national interest."
- Section 5(e): Notwithstanding the 120-day suspension of the USRAP, the Departments of State and Homeland Security may jointly determine on a case-by-case basis that admission is in the national interest, "including when the person is a religious minority in his country of nationality facing religious persecution, when admitting the person would enable the United States to conform its conduct to a preexisting international agreement, or when the person is already in transit and denying admission would cause undue hardship—and it would not pose a risk to the security or welfare of the United States."
- Section 5(g): Gives state and local jurisdictions a role in determining placement of refugees in their jurisdictions, "to the

extent permitted by law and as practicable."

- Section 8(a): Immediate suspension of the Visa Interview Waiver Program.

On January 30, the state of Washington filed a complaint with the U.S. District Court (Western District of Washington) seeking declaratory and injunctive relief against defendants Donald J. Trump in his capacity as president of the United States; the U.S. Department of Homeland Security (DHS); John F. Kelly, in his capacity as secretary of DHS; Tom Shannon, in his capacity as acting secretary of state; and the United States of America. The complaint specifically challenged Sections 3(c), 5(a)-(c), and 5(e) by asking the district court to declare them illegal and unconstitutional while enjoining their enforcement nationwide. The state of Washington also filed an emergency motion for a temporary restraining order seeking to enjoin enforcement of those sections.

On February 1, the State of Minnesota was added as a plaintiff with an amended complaint. The states sought declaratory relief invalidating certain provisions of the executive order and an order enjoining the defendants from enforcing those provisions.

On February 3, U.S. District Court Judge James L. Robart issued a temporary restraining order enjoining and restraining the defendants from enforcing Sections 3(c), 5(a) (as it relates to action that prioritizes refugee claims of certain religious minorities), 5(b), 5(c), and 5(e) (as it relates to action prioritizing refugee claims of certain religious minorities). Judge Robart further ordered the TRO to be granted on a nationwide basis and prohibited enforcement of those sections of the executive order at all U.S. borders and ports. "The work of the Judiciary, and this court, is limited to ensuring that the actions taken by the other two branches comport with our country's laws, and more importantly, our Constitution."

On February 4, the government filed a notice of appeal to the 9th Circuit Court of Appeals and an emergency motion for a stay, including an immediate stay while its emergency stay was being considered.

On February 5, the 9th Circuit Court of Appeals rejected the government's request for an immediate stay "pending full consideration of the emergency motion for a stay pending appeal".

On February 9, a three-judge panel of the 9th Circuit Court of Appeals denied the government's emergency motion for a stay pending appeal.

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Key points of the decision:

- 1) The states had standing to sue because the executive order caused a "concrete and particularized injury to their public universities [involving faculty and students, both actual and prospective, who were nationals of the affected countries] which the parties do not dispute are branches of the States under state law";
- 2) The courts had authority to review executive action to ensure compliance with the Constitution;
- 3) The government was unlikely to succeed on its appeal of the TRO given the states' due process clause claim involving permanent residents, persons who are in the United States (even if unlawfully), non-immigrant visa holders who temporarily departed or wish to temporarily depart the United States, refugees, and applicants with a relationship to a U.S. resident or institution with rights to assert. ("We are not persuaded that the Government has carried its burden for a stay pending appeal." That is, "a strong showing that [it] is likely to" prevail against the States procedural due process claims.");
- 4) The TRO should not be restricted in its geographical scope given the fact that a "fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy";
- 5) The government failed to provide any evidence that a stay was needed to avoid irreparable injury, since there was no showing that a noncitizen from any of the affected countries had committed a terrorist attack in the United States. Essentially, "The Government has taken the position that we must not review its decision at all";
- 6) The states contended the executive order violated the establishment and equal protection clauses with the intention to "ban" Muslims. The court declined to address this issue at the present time but chose to "reserve consideration of these claims until the merits of this appeal have been fully briefed." Further, "We hold that the Government has not shown a likelihood of success on the merits of its appeal, nor has it shown that failure to enter a stay would cause irreparable injury, and we therefore deny its emergency motion for a stay."

On February 10, the 9th Circuit Court of Appeals issued an order requesting briefs from the parties to address the issue of whether the panel's decision should be reconsidered *en banc* following a *sua sponte* request by a judge on the court. **On February 14**, U.S. District Court Judge James L. Robart issued an order concluding the matter of the temporary restraining order is now before the 9th Circuit Court of Appeals as a construed appealable preliminary injunction. Judge Robart found no reason to delay further litigation on other matters raised in the complaint filed by the states of Washington and Minnesota, instructing the parties to proceed with the case. At the time of this writing, the government is considering its options, including issuance of a revised executive order.

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INDIAN LAW

JUDICIAL LAW

Fort Berthold Reservation boundaries remain intact. Under the Major Crimes Act, 18 U.S.C. §1153, the United States has jurisdiction over certain crimes committed by Indians in Indian country. An Indian defendant was tried and convicted in federal court of a crime committed in New Town, North Dakota—a city within the 1891 treaty boundaries of the Fort Berthold Reservation. On appeal, the defendant argued that the federal court lacked jurisdiction over his crime because New Town was carved out of the reservation by a 1910 homestead act and so was not Indian country.

The 8th Circuit affirmed the conviction, resting its decision on two of its prior opinions that rejected the same argument regarding the effect of the 1910 act. *See Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir. 1994); *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972). Although the defendant argued that a later opinion of the Supreme Court called the first of the 8th Circuit's opinions into question, the 8th Circuit distinguished the Supreme Court opinion and held that "New Town was just as much part of the Fort Berthold Reservation when Bear committed his crimes as it was in 1891." ***United States v. Bear***, 844 F.3d 981 (8th Cir. 2016).

"Bad men" treaty provision protects against off-reservation wrongs. A police chase ended on-reservation when the suspect was shot in the back of the head. Accounts of the shooting differ, but state and local officers did not render aid to the still-alive suspect in the 32