

The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's comments

BY LEWIS F. MATUSZEWICH

On December 6, 2018 at the Illinois State Bar Association MidYear Meeting in Chicago, the International and Immigration Law Section presented a live webcast, "Immigration Law Update – Fall, 2018".

The program moderator was Juliet Boyd of Boyd & Kummer, LLC in Chicago and the panel consisted of Cindy G. Buys, the interim dean and a professor of law at Southern Illinois University School of Law; Patrick M. Kinnally of Kinnally, Flaherty, Krentz, Loan, Hodge & Masur, PC in Aurora, Illinois; and Tejas N. Shah a partner with Franczek Radelet, PC of Chicago, Illinois.

Included in the handout material was Patrick Kinnally's "Denaturalization: A New Government Sortie." A portion of the information was included in the November 2018 issue of *The Globe* in Kinnally's article, "Denaturalization: A New Government Foray." In addition, the CLE program material handout material included Kinnally's article from the October 2018 issue of *The Globe*, "Making the Government Provide Actual Notice in Removal Proceedings: *Pereira v. Sessions*".

In this issue of *The Globe* we include "Asylum and refugee law" and "The latest on sanctuary laws and litigation,"

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Asylum and refugee law

BY CINDY G. BUYS

Asylum Law

Under the Immigration and Nationality Act (INA), persons seeking asylum or refugee resettlement in the United States must satisfy the same legal definition of "refugee." The INA defines a refugee as a person who is outside his or her country of nationality and who is unable or unwilling to return to that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Under

U.S. law, the main difference between an asylum seeker and a refugee is where the person is physically located when the person applies. If the person is in the United States, the person may apply for asylum. If the person is located in a third country, the person may apply to be classified as a refugee.

One of the most difficult aspects of asylum law is determining what constitutes a "particular social group." In recent years, many people from Central America have sought asylum based on

claims that their home country is unable or unwilling to protect victims from gang violence or domestic abuse. To establish such a claim, however, the victim must show that she has a well-founded fear of persecution on account of her membership in a particular social group that is targeted for such criminal activity. The victim must also demonstrate that the government is unable or unwilling to protect the applicant.

A few immigration courts, the

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both prepared by Cindy Buys for the International and Immigration Law Seminar.

Buys and Kinnally also included their memo from August, 2016 which appeared in the October, 2016 issue of *The Globe*, concerning the legislation the International and Immigration Law Section Council approved and supported the Illinois State Bar Association by appearing to testify before the State Legislature in support of an amendment to 725 ILCS 5/113-8.

Kinnally also included in the program materials earlier articles of his: "On their own: How we can help immigrant children find a way," which was included in the June 2015 issue of *The Globe* and, "Pleading guilty and immigrant criminal defendants: A renewed call for a new law" from the August 2017 issue of *The Globe*. These are four of the over 100 articles by Patrick Kinnally which have appeared in various ISBA newsletters.

Asylum and refugee law

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Board of Immigration Appeals (BIA), and some federal courts have granted asylum based on claims of gang violence or domestic abuse. However, earlier this year, Attorney General Sessions exercised his discretionary authority to refer to himself *Matter of A-B*, an asylum case involving a domestic violence claim. On June 21, 2018, Attorney General Sessions issued an opinion, *Matter of A-B*, which overrules *Matter of A-R-C-G*, and instructs immigration judges and the BIA to interpret asylum law narrowly, in a way that will make it more difficult for domestic and gang violence to be the basis for asylum. While the Attorney General's decision may raise the evidentiary bar for claims based on gang violence or domestic abuse, it does not entirely close

David Aubrey, who practices with Gori Julian & Associates, P.C. in Edwardsville, Illinois, received his J.D. from Southern Illinois University School of Law and a M.A. in international human rights law from Trinity International University. He describes the background of the case *In Re Grand Jury Subpoena*.

"Should U.S. healthcare providers worry about the European Union's General Data Protection Regulation?" by James R. Engelman of Bloomington, Illinois first appeared in the December 2018 issue of *Health Care Law*, the newsletter of the ISBA's Section on Health Care Law.

As always, thank you to our authors and contributors. ■

Lewis F. Matuszewich
Matuszewich & Kelly, LLP
Telephone: (815) 459-3120
(312) 726-8787
Facsimile: (815) 459-3123
Email: lfmatuszewich@mkm-law.com

the door on such claims. The decision still affirms much of the pre-existing case law, such as the *Matter of Acosta* requirement that the applicant possess an immutable characteristic that the persecutor seeks to overcome.

Another area of recent controversy is the ability of asylum seekers to apply at the U.S. border or shortly after entering the county illegally. Under current law, when an individual is found illegally entering the United States, she is asked a series of questions about why she entered without legal permission and whether she has a credible fear of returning to her home country. During a credible fear interview, an asylum officer will consider whether an applicant's evidence and testimony regarding past persecution is sufficient

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OFFICE

ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITOR

Lewis F. Matuszewich

PUBLICATIONS MANAGER

Sara Anderson
✉ sanderson@isba.org

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to demonstrate a “significant possibility” that she will be able to meet her burden to establish an asylum claim. At the conclusion of such initial interview, the asylum officer has discretion to deny asylum or refer the applicant to an immigration judge for further proceedings. If credible fear is not established, the applicant is placed in removal proceedings. Prior to removal, however, the applicant has an opportunity to apply for asylum before an immigration judge.

Given the large numbers of asylum applicants at the southern U.S. border, the Trump Administration has proposed changing several relevant procedures. Most recently, President Trump issued a proclamation and the Departments of Justice and Homeland Security published a joint interim final rule entitled, “Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations,” stating that only persons who enter through a lawful U.S. port or point of entry could apply for asylum. Those entering without inspection would be barred from seeking asylum. On November 19, a federal district court judge in California determined that this change in law violated the asylum procedures set forth in the INA and entered an injunction prohibiting the new rule from taking effect.

The Trump Administration has also proposed or implemented other changes to asylum law and procedure, such as hearing newly filed claims ahead of long-pending cases, as well as changes to how “credible fear” is assessed. While these changes are aimed at reducing fraudulent claims, it is likely that they also will deter some legitimate asylum seekers.

Refugee Resettlement

Pursuant to the INA § 207(a), each fiscal year, the president has the authority to determine the number of refugees who may be admitted to the United States for that fiscal year after consultation with the appropriate Congressional committees. The president is to make this determination based on humanitarian concerns and the national interest. If an unforeseen emergency refugee situation arises during the course of the year, the president may increase this number.

The United Nations currently has identified 25.4 million refugees, in addition to internally displaced persons and stateless persons. In recent years, the largest numbers of refugees worldwide have come from Syria, Afghanistan, and South Sudan. U.S. refugee admissions show a slightly different pattern, however. In 2017, the largest number of refugees resettled in the United States came from the Democratic Republic of the Congo. The next largest groups were from Burma, Ukraine and Bhutan.

From 2002 to 2016, authorized refugee admissions in the United States remained relatively stable ranging from 70,000-85,000 per year. In September 2016, former President Obama raised the number of refugee admissions to 110,000 for fiscal year 2017 in light of the unprecedented refugee crisis worldwide.

Upon taking office in early 2017, one of President Trump’s first acts was to lower refugee admissions in fiscal year 2017 to 50,000 as part of his first “travel ban” which prohibited the admission of persons from seven countries. Section 5 of that Executive Order suspended the Refugee Admissions Program for 120 days. Litigation ensued, pursuant to which lower federal courts enjoined much of the travel ban. President Trump issued a second travel ban on March 7, 2017, which again put a 120-day hold on refugee admissions. That travel ban was also temporarily enjoined by lower federal courts. In June 2017, however, the U.S. Supreme Court allowed the Executive Order largely to take effect, including the suspension of refugee admissions, except for non-U.S. citizens with a bona fide relationship to a person or entity in the United States. However, the Supreme Court later clarified that the bona fide relationship did not include an assurance from a U.S. refugee resettlement agency. In October 2017, the U.S. government resumed the refugee admissions program upon the expiration of the 120-day period. However, it announced delayed processing for persons from eleven mostly Middle Eastern countries considered high risk by the Trump Administration.

According to data from the Migration Policy Institute, the United States actually admitted 53,716 refugees in fiscal year 2017. The number was slightly higher than

authorized due to the fact that many refugees had already been accepted for resettlement prior to President Trump taking office.

The United States resettled only 33,000 refugees in 2017. That number dropped further to 22,491 refugees in fiscal year 2018, even lower than the 45,000-person cap set by President Trump in September 2017. The Trump Administration has lowered this cap even further to only 30,000 refugees in fiscal year 2019, the lowest in the history of the U.S. refugee resettlement program. ■

Cindy G. Buys is the interim dean and a professor of law at Southern Illinois University School of Law. Dean Buys is a member and past chair of the International and Immigration Law Section Council of the ISBA, as well as being the secretary of the Women and the Law Committee of the ISBA.

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3. 8 U.S.C. § 1103 (g)(2) and (h)(1)(i) (2018).
4. *Matter of A-B-*, 27 I. & N. Dec. 316 (AG 2018).
5. 8 U.S.C. § 1225(b)(1)(B)(ii).
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The latest on sanctuary laws and litigation

BY CINDY G. BUYS

Overview

Although there has been much discussion of “sanctuary” jurisdictions of late, there is no accepted legal definition of a “sanctuary” city or state. The term is generally understood to mean a city, county or state that limits its cooperation with the federal government’s efforts to enforce immigration laws. States give a few reasons to justify the adoption of a so-called sanctuary policy, including:

- To reduce local resources being used to carry out a federal program;
- To reduce fear of deportation among immigrant communities and to keep immigrant families together; and
- To encourage immigrants to participate in local law enforcement, such as reporting crimes as witnesses or victims.

Brief History

Berkeley, C.A. became the first sanctuary city in 1971. However, the sanctuary movement for immigrants really grew in the 1980s in response to persons fleeing violent civil wars in Central America and seeking refuge in the United States. Hundreds of thousands of people lost their lives due to armed conflict in El Salvador, Guatemala, Honduras and Nicaragua in the 1980s. Many persons fled to the United States, but U.S. authorities took the position that persons fleeing civil war did not meet the legal definition of refugee and refused to grant them asylum. As a result, churches stepped up and offered sanctuary instead.

Building on that history, U.S. states and cities currently are adopting “sanctuary” policies in response to increased immigration enforcement by the Trump Administration. According to the Center for Immigration Studies, seven states have sanctuary policies, including Illinois, in addition to hundreds of cities and counties around the United States.

Illinois Trust Act (August 2017)

Federal law requires states to share information about immigration status, 8 U.S.C. § 1373, but does not require the collection of such information or any other action by states or localities based on a person’s immigration status.

The Illinois Trust Act, 8 ILCS 805/1, is a type of “sanctuary” law. It states that law enforcement officers are not restricting from complying with the federal requirement to send or receive information regarding immigration status. However, Illinois law enforcement officers are prohibited from stopping, arresting, searching, or detaining a person based solely on the person’s citizenship or immigration status. In addition, law enforcement officers are prohibited from detaining a person based on an administrative immigration detainer or non-judicial immigration warrant.

This law does not affect a law enforcement officer’s ability to stop, arrest, or detain a person who has committed a crime. Likewise, law enforcement officers will still comply with a judicial or federal warrant for a person’s arrest or detention.

Litigation Regarding Sanctuary Jurisdictions

In January 2017, President Trump issued Executive Order 13,768, in which he announced that jurisdictions that fail to comply with federal law will not receive federal funds and established procedures to make “sanctuary jurisdictions” ineligible for federal grants. The executive order does not define a “sanctuary jurisdiction” nor is that term defined elsewhere in federal law. Instead, the executive order gives the Attorney General and the Secretary of Homeland Security the ability to designate a city or state a sanctuary jurisdiction as they see fit.

Then Attorney General Sessions announced that state and local law enforcement must meet three conditions to receive federal funds: (1) alert federal agents when an undocumented immigrant is scheduled to be released from state or local custody; (2) allow federal agents to question undocumented immigrants while in state or local custody; and (3) ensure they are not restricting state and local law enforcement officers from providing federal agents with information about the legal status of undocumented immigrants.

Several so-called sanctuary cities, including Santa Clara, San Francisco, and Chicago, challenged Executive Order 13,768. These jurisdictions stood to lose billions of dollars of federal funds that they relied on to provide medical services, meals, transportation, and other services for their residents. They argued the executive order is

unconstitutional because:

- It violates separation of powers because the president is seeking to exercise spending powers that belong to Congress;
- It is overbroad and coercive because it attempts to withhold all federal funds and not just those related to immigration or law enforcement;
- It violates the Tenth Amendment to the U.S. Constitution because it attempts to commandeer state and local resources and policies; and
- It is void for vagueness and thus violates due process because it does not give notice of what is covered and did not give targeted jurisdictions any opportunity to be heard.

In November 2017, the U.S. District Court for the Northern District of California became the first court to issue a decision on these challenges. In *County of Santa Clara v. Trump* and *County of San Francisco v. Trump*, the court held against the federal government on every count. The District Court stated:

- The Spending Power belongs to Congress under Article I of the U.S. Constitution; not the President, so the President cannot use an Executive Order to place new conditions on funds allocated by Congress. Congress repeatedly rejected bills on several occasions that would have penalized sanctuary jurisdictions thus showing Congress' opposition to the President's Order.
- The Tenth Amendment to the U.S. Constitution requires that conditions on funds be clear at the time the funds are offered and accepted; that any conditions bear some relation to the funds at issue; and that the conditions not be unduly coercive. The executive order is unconstitutional because it attempts to withhold all federal funds and not just the portion related to immigration or law enforcement.
- The executive order violates the

Tenth Amendment to the U.S. Constitution because it attempts to commandeer state and local resources and policies to carry out federal policies.

- The executive order is void for vagueness and thus violates due process because it does not give notice of what is covered. It does not define sanctuary jurisdiction and it does not state what it means to hinder enforcement of federal law. It also did not give targeted jurisdictions any opportunity to be heard before federal funds are cut.

Although the lawsuit involved the counties and cities of San Francisco and Santa Clara, the district court judge issued a nationwide injunction enjoining enforcement of the executive order. As a result, some cases in other jurisdictions (such as Massachusetts and Washington) were stayed or dismissed. The federal government appealed the decision to the U.S. Court of Appeals for the Ninth Circuit. In August 2018, the Ninth Circuit upheld the District Court's decision that the executive order is unconstitutional but vacated the nationwide injunction and remanded the case for further proceedings.

Meanwhile, in April 2018, the U.S. Court of Appeals for the Seventh Circuit in *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018), agreed with the California district court that the executive order is unconstitutional. Specifically, it agreed that the executive order violates separation of powers because Congress holds the power of the purse, not the president, and because the federal government cannot conscript state and local authorities into enforcing federal immigration law. It is still considering whether a nationwide injunction is appropriate.

In June 2018, a U.S. District Court in Eastern Pennsylvania also ruled against the Trump Administration with respect to the City of Philadelphia's "sanctuary city" policy in which it refused to use local resources to enforce federal immigration law. There, the city successfully challenged conditions imposed on the receipt of federal funds under the Edward Byrne Memorial

Justice Assistance Grant (JAG). The federal government has appealed that decision to the Third Circuit Court of Appeals.

In July 2018, New York and several other states also sued the Trump Administration in U.S. District Court for the Southern District of New York court challenging the imposition of conditions that require immigration enforcement cooperation for the receipt of federal JAG monies. On November 30, 2018, U.S. District Court Judge Ramos agreed with the other courts that President Trump's attempt to withhold federal funds from sanctuary jurisdictions violates both federal statutes and the U.S. Constitution. He declined to issue a nationwide injunction finding it unnecessary to provide plaintiffs with relief.

In conclusion, the Trump Administration has lost every case challenging Executive Order 13,768 thus far. Some legal experts have suggested that the Supreme Court's June 2018 decision regarding sports betting, *Murphy v. National Collegiate Athletic Ass'n*, suggests the current Supreme Court is unlikely to uphold the executive order. In *Murphy*, the U.S. Supreme Court adopted a robust reading of the Tenth Amendment and limited the federal government's ability to tell state legislatures what they can and cannot do. If the Supreme Court were to apply similar reasoning to the sanctuary city litigation, it is unlikely to find that President Trump has the power to dictate to the states how to utilize local law enforcement resources to enforce federal immigration laws and policies. However, the final outcome of the sanctuary litigation remains to be seen. ■

Cindy G. Buys is the interim dean and a professor of law at Southern Illinois University School of Law. Dean Buys is a member and past chair of the International and Immigration Law Section Council of the ISBA, as well as being the secretary of the Women and the Law Committee of the ISBA. The views expressed herein are solely those of the author.

1. See *City and County of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018).

2. *City of Philadelphia v. Sessions*, 309 F. Supp. 289 (2018).

3. *States of New York, Connecticut, New Jersey, Rhode Island, Washington, Massachusetts and Virginia v. U.S. Dept of Justice*, 18 Civ. 6471 (ER).

The peculiar case of *In re Grand Jury Subpoena*

BY DAVID W. AUBREY

The investigation by Special Counsel Robert Mueller has yielded dozens of mysterious plots and subplots over the past year, but none so peculiar for legal scholars as *In re Grand Jury Subpoena*, which has been shrouded in secrecy. For lawyers interested in International Law, the question presented by the case so far hinged on whether subject-matter jurisdiction of federal courts exists over criminal offenses by foreign sovereign defendants pursuant to 18 U.S.C. § 3231. The U.S. Court of Appeals for the D.C. Circuit held in this case that subject-matter jurisdiction does exist over criminal offenses.

The case began in August, referred to in the docket as 18-3071, with the name, *Sealed v. Sealed*. Public speculation began in October when the online newspaper Politico published a story about the dispute after a Politico reporter, Darren Samuelsohn, overheard a comment in the U.S. court of Appeals, D.C. Circuit clerk's office mentioning Robert Mueller's sealed case.

On December 14, remarkable effort was made to keep parties secret during a oral arguments before the U.S. Court of Appeals for the D.C. Circuit, including removing all persons from the fifth floor of the Courthouse and clearing all the elevators before the parties argued. On December 18, the court of appeals affirmed the District Court's ruling, *de novo*, in the first publicly published opinion in the case.

This order revealed that the subpoenaed party is a defendant corporation, which is owned by "Country A." The defendant corporation did not obey the order and was held in contempt by the district court, including the issuance of monetary sanctions. The defendant corporation asked the U.S. Supreme Court to block the order. On Sunday, December 23, Justice John

Roberts temporarily stayed the case.

The defendant corporation in this case made three arguments. First, the defendant corporation argued that 18 U.S.C. § 3231 never applied to foreign sovereign defendants and thus, the Court lacked subject-matter jurisdiction. Along this line of reasoning, the defendant corporation argued that the statute did not apply to criminal proceedings. Second, the defendant corporation contested the issuance of monetary sanctions. Third, the defendant corporation argued that the subpoena was oppressive because compliance with same would cause defendant corporation to violate the laws of its own nation, Country A.

The court of appeals ruled against the defendant corporation for each of these points. First, the court concluded that subject-matter jurisdiction existed because of the explicit language of 18 U.S.C. § 3231. The court reasoned:

Indeed, the contrary reading of the Act, which would completely insulate defendant corporations majority-owned by foreign governments from all criminal liability, seems in far greater tension with Congress's choice to codify a theory of foreign sovereign immunity designed to allow regulation of foreign nations acting as ordinary market participants.

Because the court saw no conflict between civil and criminal jurisdiction, it ruled that the statute granted jurisdiction over both civil and criminal offenses. Accordingly, the court found that the commercial activity exception to the Foreign Sovereign Immunities Act applied to "any case" and not only to civil cases.

The court went on to explain that the government had shown that an exception to Foreign Sovereign Immunities Act by

submitting *ex parte* evidence, which was allowed in such a case. Pursuant to 28 U.S.C. § 1605(a)(2), the government must prove by reasonable probability that an act outside the United States territory in connection with commercial activity of the foreign state elsewhere caused a direct effect in the United States. Here, the court concluded that such acts and effects were proven by reasonable probability. Therefore, the subpoena was proper.

Second, the court concluded the Foreign Sovereign Immunities Act allowed the issuance of monetary sanctions. The court cited precedent against the Democratic Republic of Congo for fine of \$5,000 a week.¹

Third, the court concluded the subpoena was not oppressive because the defendant corporation did not prove compliance with same would violate the laws of Country A. The court revealed that the defendant corporation submitted evidence of this allegation via testimony of its counsel and a regulator from Country A.

Rejecting this allegation, the Court explained that the text of the foreign law cited by the defendant corporation does not support the claim by the defendant corporation. Thus, the court concluded that the compliance with the subpoena does not violate a law of Country A. Accordingly, all three objections by the defendant corporation were denied and the district court's ruling was affirmed.

In conclusion, *In re Grand Jury Subpoena* remains a fascinating case for lawyers who are interested in International Law. So far little is known about the case, except that the government is compelling discovery from a foreign corporation that is owned by a foreign government. It is also clear that some criminal act by that corporation was also

within the commercial exception to Foreign Sovereign Immunities Act. With Supreme Court review pending, this is a case well-worth tracking. ■

David W. Aubrey primarily represents clients diagnosed with mesothelioma and their families. In addition, David represents those injured in

commercial trucking accidents, whistle blowers in qui-tam actions, and prisoners in civil rights cases. His contact information follows.

*Gori Julian & Associates, P.C.
156 North Main Street
Edwardsville, Illinois 62025
Phone: 618-659-9833
Fax: 618-659-9834
E-Mail: David@gorijulianlaw.com
www.gorijulianlaw.com*

1. <https://www.theguardian.com/us-news/2018/dec/18/sealed-v-sealed-robert-mueller-mysterious-case-subpoena>.
2. <https://www.politico.com/story/2018/10/24/mueller-investigation-grand-jury-roger-stone-friend-938572>
3. See *In re Grand Jury Subpoena*, 2018 WL 6720714 (D.C. Cir. 2018), <https://lawfare.s3-us-west-2.amazonaws.com/staging/2018/395974126-12-18-18-DC-Circuit-Grand-Jury-Subpoena.pdf>.
4. See, e.g., *FG Hemisphere Associates v. Democratic Republic of Congo*, 637 F.3d 373 (D.C. Cir. 2011).

Should U.S. healthcare providers worry about the European Union's General Data Protection Regulation?

BY JAMES R. ENGELMAN

The General Data Protection Regulation (GDPR) came into effect on May 25, 2018.² In effect, it declares data privacy and protection as fundamental rights for European residents. The purpose of the GDPR is to protect the personal data of European Union (EU) citizens, including how that data is collected, stored, processed, used and destroyed once it no longer needs to be maintained. It has created a great deal of buzz in the privacy world. With its expanded territorial scope, the GDPR applies to many entities not currently covered by the European Union directive. As a result of its very ambitious scope, as well as the heavy fines for noncompliance, all sorts of eye-catching headlines have boldly stated things such as: "All US-based companies, possessing the personal data of EU residents, are subject to the GDPR." But, is that accurate? Let's take a look.

Undoubtedly, the GDPR creates unprecedented privacy rights such as:

- Data portability. The right to have personal data transferred to either the individual or another company in a commonly used "machine readable format."
- Right to be forgotten. The right to require the controller to delete

personal data.

- Right to transparency. The right to require data controllers to provide detailed (and easy to understand) information about a company's personal data handling practices. (Companies governed by the GDPR must clearly disclose: any data collected or processed; the purpose of any data collected or processed; how long the data will be retained; and, if the data will be shared outside of the EU or with third parties).

In addition, under the GDPR, personal data can be processed only in certain limited, specified circumstances or with consent (which can be withdrawn). The GDPR also introduces a new mandatory breach reporting requirement. If a breach occurs:

- The relevant supervisory authority must be notified "without undue delay" and where feasible, within 72 hours after the data controller becomes aware of the breach.
- The data subjects must be notified "without undue delay" where the breach is likely to result in "a high risk to the rights and freedoms of data subjects."

Companies located outside of the EU,

who are subject to the GDPR, must appoint a representative in Europe who can serve as a link between the European authorities and the foreign company. Also, some companies must appoint a Data Protection Officer (DPO). The DPO is an individual whose duties include informing and advising the data controller of its obligations and also monitoring compliance, overall, with the GDPR. Further, such companies must also perform an annual risk assessment.

Under the GDPR, the consequences for noncompliance are staggering. Serious violations may result in a penalty which is the greater of 20 million Euros or 4% of the company's group global annual turnover of the past financial year. In addition, class actions (the European equivalent thereof) are possible.

The GDPR's definition of "personal data" is extremely broad. It goes beyond the typical definition of personal information found in U.S. privacy laws. Personal data is defined as any information that can serve to identify a living individual – either by itself or in conjunction with additional information stored separately. Sensitive personal data is data consisting of racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, genetic

data, biometric data, data concerning health or data concerning a natural person's sex life or sexual orientation. This all-encompassing definition of personal data includes numerous types of data including employee data, customer data, and vendor data.

The GDPR utilizes some unique terminology. A "data controller" determines the purposes and means of the processing of personal data. A "data processor" processes personal data on behalf of a data controller. These concepts are very similar to HIPAA's "covered entity" and "business associate" concepts/terms. The GDPR directly imposes liability on data controllers and data processors. Previously, data processors were only obligated to follow European privacy laws by contract. The imposition of direct liability represents a major change in the EU and has triggered all sorts of cascading effects. All of this is similar to the Health Information Technology for Economic and Clinical Health Act (HITECH Act) in the U.S. which amended HIPAA and imposed on business associates, for the very first time, a direct obligation to comply with HIPAA.

The GDPR embraces a number of "data protection principles", including:

- Fair and lawful processing – (i) be transparent - data subject must be informed of certain information; and (ii) you must have a lawful basis for the processing.
- Purpose limitation – (i) personal data shall be obtained only for one or more specified lawful purposes; and (ii) personal data shall not be further processed in any manner incompatible with that purpose (this interjects the need to obtain "secondary consent").
- Data minimization - personal data shall be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (this is very similar to HIPAA's "minimum necessary" concept).

So, who does the GDPR apply to? Obviously, it applies to companies

established in the EU that process personal data (for example, it would apply to a health care system operating a hospital or clinic in the EU). But, does it truly apply to any U.S. company in possession of personal data with respect to EU residents? The answer is "no." In order to be within the scope of the GDPR, a U.S.-based company must meet one or both of two tests:

- Offer goods or services directly to individuals in the EU; or
- Monitor behavior of individuals in the EU.

An example of a company located in the United States and subject to the GDPR, would be an online company whose website is designed to accept euros in payment, contains content in the language of an EU member state, and who regularly ships its products to the EU. Another example would be a data broker actively collecting personal information relative to EU residents from various sources, such as internet interactions and social media sites, in order to create and sell marketing lists. Finally, the GDPR may also apply to a health care system, located in the U.S., which actively advertises or solicits patients, in the EU, through agents and/or media/electronic methods.

A healthcare provider in the U.S. could certainly collect, use and store personal data relative to EU residents under a number of circumstances. By way of illustration, a citizen of France may seek medical care while visiting relatives in New York City. In this situation, personal data may be collected directly from the individual as well as from the individual's treating physician located in France. However, this data collection, use, and potential storage does not provide a sufficient nexus with the EU. The hospital would not be subject to the GDPR as a result of these activities.

This is very similar to Canada's Anti-Spam Legislation (CASL) which made the headlines not too long ago due to its very intentional extra-territorial reach and staggering penalties. (CASL requires consent before a "Commercial Electronic Message" (CEM) is sent to a Canadian resident.

And, it also contains mandatory content requirements such as the inclusion of an unsubscribe mechanism). But, even CASL, with its very aggressive scope, has its limits with respect to its reach. Comparable to the GDPR, there has to be a sufficient nexus between the foreign company and Canada. Specifically, the CEMs must be sent to or from a computer located in Canada.

At the end of the day, the dramatic headlines related to the GDPR are not completely accurate. There's no doubt that the GDPR represents a major expansion of the EU's territorial reach in the world of privacy laws, but that reach certainly stops short of invading the U.S. Healthcare System.

Counsel, State Farm Insurance Companies, One State Farm Plaza, Bloomington, Illinois 61710. The views expressed herein do not necessarily reflect the view and position of State Farm. The author is speaking solely in his individual capacity.

1. See <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1532348683434&curi=CELEX:02016R0679-20160504>.

Lewis F. Matuszewich receives award for 20 years of service

At a recent meeting of the International and Immigration Law Section Council at the Illinois State Bar Association's Chicago Regional Office, Section Council Chair Shama Patari (right) presented to Lewis F. Matuszewich (left) a plaque in recognition of his 20 years serving as editor of *The Globe*, the section's newsletter.

Starting with the August 1998 issue, Mr. Matuszewich has edited 138 issues of *The Globe*. Mrs. Patari is the 19th chair of the International and Immigration Law Section Council that he has worked with. The first chair of the Ssection who appointed Mr. Matuszewich to serve as editor was Mary L. Milano. Three former chairs of the section council are currently serving members of the section, including Mark Wojcik, Patrick Kinnally, Juliet Boyd, and Cindy Buys.

The photograph was taken by Professor Mark Wojcik of The John Marshall Law School.

