June 2015 Vol. 52, No. 8

ILLINOIS STATE BAR ASSOCIATION

The Globe

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

Editor's comments

By Lewis F. Matuszewich

As we are finalizing the work to forward this, the eighth issue of *The Globe* for the 2014-2015 ISBA year, I remain amazed at how fortunate Illinois is to have so many organizations, individuals and resources to assist with questions concerning international and immigration topics, including the Illinois State Bar Association's Section on International and Immigration Law. The organizations provide many opportunities for meeting not only other attorneys practicing in this area, but also making contacts with potential clients and sources of contact.

In the last few days alone, I have received:

- The International Trade Club of Chicago offering an import workshop, "A Fresh Look at Industry Technology Advancements for Trade

Continued on page 2

Message from the Chair

By Lynne Ostfeld

Congratulations to law students Saiena Shafiezadeh (John Marshall), Haley Guion (DePaul), Sarah Bendtsen (DePaul), James Larsen (Northwestern), Chloe Bremer (Loyola), and Seth Heim (Chicago-Kent) on being selected by their law schools to receive scholarships from the Nordic Law Club. This scholarship program was started a number of years ago to benefit students studying international law and to "make amends" for Viking raids into their ancestral homelands. Judge (retired) Perry Gulbrandsen came up with the idea and worked tirelessly organizing golf outings to fund the scholarships. Patti Oakley volunteered to be Scholarship Chair and worked with the law schools to pick appropriate students. Saiena, Haley, Sarah and Jim were able to attend the Nordic Law Club's recent Spring Smorgasbord (a/k/a Codfish Dinner) to receive their awards and the NLC's best wishes. They are fascinating young people, each passionate about the areas of law they hope to enter. Keep an eye out for them.

This is my last column as Chair of the International & Immigration Law Section Council. I want to thank Lew Matuszewich for his fabulous and always helpful work putting The Globe out every six weeks. While I appreciate all the help provided by the Section Council members in general, I want to particularly thank Tejas Shah, who was my vice-chair and is the incoming chair, Pat Kinnally who was secretary but particularly because of his copious output of articles for *The Globe*, and Juliet Boyd who handled the paperwork and interactions with ISBA staff to put on our CLE programs.

We have expanded the variety of topics covered in *The Globe* and our CLE. I hope that those of you who read my columns will consider taking a more active role in this Section and the Section Council in the upcoming years.

Lynne R. Ostfeld
Lynne R. Ostfeld, P.C.
300 N. State Street
Suite 5405
Chicago, Illinois 60654
(312) 645-1066 Telephone
(312) 645-1515 Facsimile
lynnero@mac.com ■

INSIDE

If you're getting this newsletter by postal mail and would prefer electronic delivery, just send an e-mail to Ann Boucher at aboucher@isba.org

Editor's comments

Continued from page 1

Compliance" being held at DePauw University O'Hare Campus;

- The International Trade Association of Greater Chicago's Illinois International Business Calendar, co-sponsored by the Office of Trade Investment of the Illinois Department of Commerce and Economic Affairs and the Illinois District Export Council, on behalf of the U.S. Commercial Service, Chicago. *The Globe* has from time to time in the past included with permission from the ITA/GC excerpts from their calendars;
- The Life Science Leader Newsletter, including an article, "The Challenge of Performing Global Trials" (this reference is to medical, not litigation trials);
- The Chicago-based International Council on Tall Buildings and Urban Habitat, which is located on the Illinois Institute of Technology campus, describing its various seminars and competition for student authors writing concerning urban building design international;
- *The Basic Guide to Exporting: A Roadmap for your Global Business* – the 11th Edition of a Basic Guide to Exporting, put out by the U.S. Department of Commerce, which is a great assistance to attorneys in answering questions from their clients and potential clients concerning the business side of trade;
- Announcement for the Illinois District Export Council with the International Trade Association of Greater Chicago's seminar on "Corruption in Asia: Avoiding FCPA Violations." *The Globe* has recently run a four-installment detailed article concerning the Federal Corrupt Practices Act.
- M&C Savvy Planner Tip: Inform International Attendees (VIDEO provided).

Listing the above is not an attempt to be a definitive list, but rather a few examples of the range of programs and resources available.

In this issue of *The Globe*, Section Council Chair, Lynne Ostfeld, in addition to her "Message from the Chair" has provided to us Part II of "The Lady in Gold: Jurisdictional and Other Legal Issues in its Recovery," which is coincidental with the recent release of the movie touching on the same events and topics.

Section Council Secretary, Patrick Kinnally provided to us, "On their own: How we can help immigrant children find a way." David Aubrey, completing his first year serving as a member of the Section Council, has provided us with his article, "Case Update – *Daimler AG v. Bauman*."

With this issue of *The Globe*, Lynne Ostfeld is providing her final "Message from the Chair" for this ISBA year. I wish to thank Lynne for her continual follow up and efforts to have members of the Section Council, and many other authors, provide material for publication in *The Globe*.

I would also like to thank the many authors who submitted articles that enabled us to produce eight high quality issues of *The Globe* for this ISBA year.

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

The Lady in Gold: Jurisdictional and other legal issues in its recovery, part II

By Lynne R. Ostfeld

This is Part II of the article about the recovery of the famous Gustav Klimt painting of Adele-Bloch-Bauer, known as the Lady in Gold. The film, The Woman in Gold, has recently been released and is well worth seeing. Be advised that the legal aspects of the battle are downplayed in favor of the more emotional and visual aspects. To make it easier for those watching the film, almost everything was in English, although the arguments in Austria were in German. Attorneys interested in knowing more, are well advised to watch the YouTube videos referenced at the end, and to read the book.

The Bloch-Bauers' third attempt to recover the paintings—The U.S. lawsuit

Schoenberg knew that they would not recover the paintings through legal proceedings in Austria and that he had to find some way to bring suit in the United States and have it heard here. He found the means when he happened on a copy of a catalogue from the Austrian National Gallery which was for sale in a Los Angeles bookstore. Austria was engaged in a commercial activity. He found his personal jurisdiction.

They filed suit in Los Angeles Federal Court alleging eight causes of action and violations of Austrian, international, and California law. The complaint asserted jurisdiction under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1330(a):

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603 (a) of this title as to any claim for relief *in personam* with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

It stated that the defendants were engaged in a commercial activity in the U.S. and were not entitled to immunity under the FSIA because of the Act's "expropriation exception" in § 1605(a)(3).

> **(a)** A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> **(1)** in which the foreign state has

waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

This exception exempts from immunity all cases involving "rights in property taken in violation of international law," provided the property has a commercial connection to the United States or the agency or instrumentality that owns the property is engaged in commercial activity here." *Republic of Austria v. Altman*, 541 U.S. 677, 159 L.Ed.2d 1 (2004) at 685-6.

Petitioners filed a motion to dismiss based on their claim of sovereign immunity, that they enjoyed absolute immunity and that the FSIA could not apply retroactively to anything which took place in 1948.

The District Court rejected this argument on the basis that the FSIA did apply to actions taken prior to the adoption of the FSIA in 1976 and that the Act's expropriation exception extends to Altman's specific claims. The court deemed the FSIA a jurisdictional statute which did not alter substantive legal rights. It ruled that the Act would be applied to all cases decided after its enactment regardless of when the plaintiff's cause of action may have accrued.

The 9th Circuit Court of Appeals upheld the lower court's decision. Rather than relying on the Act's jurisdictional nature, the court found that application of the FSIA was not impermissibly retroactive because Austria could not have expected to receive immunity for the wrongdoing when it occurred.

The U. S. Supreme Court accepted *certiorari*. It affirmed the judgment of the Court of Appeals but for different reasons It ruled solely on the issues of whether the FSIA applied retroactively to pre-1976 actions and specific claims.

Foreign Sovereign Immunities Act

The U.S. Supreme Court (SCOTUS) cited *Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812) as the source of American jurisprudence on foreign sovereign immunity. This case dealt with ownership of a French ship which had taken refuge in the port of Philadelphia. Chief Justice Marshall had written that foreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement. As a matter of comity, the international community had implicitly agreed to waive jurisdiction over other sovereigns in certain classes of cases. 541 U.S. 688-689.

Until 1952, the Executive Branch of the U.S. government followed a policy of requesting immunity in all actions against friendly sovereigns, but then decided that it should no longer be granted in certain types of cases. Rather than applying absolute immunity, it decided to apply a "restrictive theory" of sovereign immunity." Thus, the sovereign would be granted immunity with regard to sovereign or public acts (*jure imperii)* but not with respect to private acts (*jure gestionis*). 541 U.S. 690.

This change caused great confusion particularly when foreign states requested immunity or even failed to request immunity.

In 1976 Congress sought to remedy the problems by enacting the FSIA. The goal was to implement a set of standards governing claims of immunity in every civil action against a foreign state. It would codify the restrictive theory of sovereign immunity and transfer primary responsibility for immunity determinations from the Executive to the Ju-

THE GLOBE

Published at least four times per year.

Annual subscription rate for ISBA members: $25.

To subscribe, visit www.isba.org or call 217-525-1760

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
101 N. Virginia Street
Crystal Lake, IL 60014

MANAGING EDITOR/ PRODUCTION
Katie Underwood
kunderwood@isba.org

Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

dicial Branch. This would remove some of the political aspects of the cases.

Of importance to the Court's decision, the preamble states that "henceforth" federal and state courts were to decide claims of sovereign immunity in conformity with the Act's principles. The Act would prescribe the procedure to obtain personal jurisdiction over a foreign state, in § 1330(b) and would carve out certain exceptions to the general grant of immunity, including the expropriation exception. 541 U.S. 691.

The District and Appellate Courts agreed with Altman that the FSIA's expropriation exception covered Austria's alleged wrongdoing. The U.S. Supreme Court declined to review this aspect.

For the U.S. Supreme Court, the sole issue was the FSIA's general applicability to conduct that occurred prior to the Act's 1976 enactment, more specifically to anything which happened prior to the State Department's 1952 adoption of the restrictive theory of sovereign immunity. 541 U.S. 692.

The Supreme Court first looked at the issue of any law being applied retroactively. It determined that laws cannot be applied retroactively, without explicit statement to that effect by the law maker, when a substantive right would be affected. There is an anti-retroactivity presumption, though it is not a constitutional command. There is generally no retroactive affect on substantive rights when the new law merely confers or changes the tribunal which is to hear a case. When the statute contains no express statement as to a retroactive effect, the court must make this determination.

This brings the Court to the issue of whether the Act affects Austria's substantive rights, and thus would be impermissibly retroactive, or addresses only matters of procedure. 541 U.S. 694.

Prior to 1976, foreign states had an expectation of immunity for their public acts but no "right" to such immunity. The FSIA merely opened up U.S. courts to plaintiffs with pre-existing claims against foreign states. It did not impose new duties or increase those states' liability for past conduct. Thus, the Court reasoned that the Act did not appear to unfairly operate retroactively.

Prior decisions operated to avoid *post hac* changes to legal rules on which parties had relied in shaping their conduct. But foreign sovereign immunity was not to permit foreign states to shape their conduct in reliance on future immunity from suit in U.S. courts but to grant some current protection from the inconvenience of suit as a gesture of comity. 541 U.S. 696, *citing Dole Food Co. v Patrickson*, 538 U.S. 468 (2003).

Based on the preamble to the FSIA, the Court stated to find clear evidence that Congress intended the Act to apply to pre-enactment conduct:

> "'*Claims* of foreign states to immunity should *henceforth* be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.' 28 U.S.C. §1602 (emphasis added)."

541 U.S. 697.

The Court held that a prior holding (in *Landgraf v. USI Film Products*, 511 U.S. 244 [1994]) requiring an express command as to retroactivity may not have been met but it found the language sufficient to require claims to "henceforth" be decided by the courts, regardless of when the underlying conduct occurred. 541 U.S. 697 - 698.

The FSIA was intended by Congress to be the sole basis for obtaining jurisdiction over a foreign state and unquestionably applied to claims based on pre-1976 conduct. 541 U.S. 698.

The Austrian government argued that foreign expropriations are public acts for which sovereigns expected immunity, prior to the enactment of the FSIA. The Court held that the FSIA did not affect the application of the doctrine to acts of state. The government still had this argument.

It also quickly rejected the Executive Branch's arguments in favor of the Austrian government having immunity by ruling, on its *amicus* brief, that the reach of the FSIA is purely a question of statutory construction, well within the province of the judiciary. 541 U.S. 701.

The Federal District Court of Los Angeles could hear the case, which it did, until the parties agreed to submit it to arbitration.

Maria Altman was on one side or the other of being 90 years old. Randy Schoenberg suggested that they could spend another year and one-half of vicious litigation or she could take her chances and try arbitration, which the Austrians had previously rejected. Without it, she might not live to see the end of the case. She chose arbitration. As it turned out, they won.

Before submitting the paintings for sale, Schoenberg arranged for a California museum to display all of the paintings in one room, exactly as they had been displayed when Ferdinand had them in his home. ■

Lynne R. Ostfeld, Lynne R. Ostfeld, P.C., is a solo practitioner with a general civil practice, a satellite office in Peoria Co., and an associated office in Vincennes and Paris, France. She does civil litigation, probate and estate planning, corporate law, agribusiness, and general advice to French and Americans with problems in the other country, culture and language. Lynne may be reached by e-mail at lynnero@mac.com.

This article is Part II of Lynne Ostfeld's article on The Lady in Gold. The first installment appeared in the previous issue of *The Globe*.

References:

The Lady in Gold, O'Connor, Anne-Marie, pub. Alfred A. Knopf (2012

Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1330(a)

Republic of Austria et al v. Altman, 541 U.S. 677 (2004)

www.artrestitution.at

Randy Schoenberg YouTube speech: www.youtube.com/watch?v=AvXMjq9e2cg

Randy Schoenberg background: www.bslaw.net/schoenberg

Adele's Last Will (2006): www.youtube.com/watch?v=0HnwGgHA_aM

On their own: How we can help immigrant children find a way

By Patrick M. Kinnally

The United States Customs and Border Protection agency, a federal executive agency, has as its mission to protect the national security of the United States. A tall order. It does so by apprehending undocumented migrants seeking to enter the United States. It did so in 2014 with almost 480,000 apprehensions on the southwest border of the United States. (*Congressional Advisory* "Unaccompanied Children Summary" June 2014) Approximately 2,800 of those were children from various countries such as El Salvador, Honduras, Guatemala and Mexico. Perhaps, this influx may be attributed to the Federal Government's executive order which allows undocumented children to apply for deferred action and employment authorization. (See, *Crane v. Johnson* (5th Cir. No. 14-10049, April 2015)

This migration of unaccompanied minors may be a reflection of the turmoil in the countries from where they originate (See, *State of Texas v. United States* (No. 14-cv-254 (S.D. Tex.) The purpose of this article is not to engage in the efficacy of the federal government's order or the policies of foreign nations. The focus here, is how, we as lawyers, can help undocumented unaccompanied minors find refuge.

The Immigration and Nationality Act (INA) provides that special immigrant juveniles (SIJ) or court dependents can qualify for lawful permanent resident status if they meet certain requirements. (8 USC 1101(a)(27)(J)).

The requirements for such eligibility for the juvenile are s/he is:

- under 21 years of age
- is unmarried
- has been declared dependent upon a juvenile court located in the United States in accordance with State law governing such declarations of dependency, while the alien was in the United States and under the jurisdiction of the court
- has been deemed eligible by the juvenile court for long term foster care
- continues to be dependent upon the juvenile court and eligible for long term foster care; and
- has been subject of a judicial or administrative proceedings authorized or recognized by the juvenile court in which it has been determined that it would not be in the minor's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or his or her parents

In Illinois, a minor is defined as a person who has not reached the age of 18 years of age except for purposes under the Illinois Uniform Transfers to Minors Act (760 ILCS 20/2(12) where a minor is a person who has not attained the age of 21. (755 ILCS 5/11-1).

The Illinois Probate Act relating to a guardianship for a minor does not require a minor to be a United States citizen. An Illinois court may not appoint a guardian for a minor unless the minor has a living parent whose parental rights have not been terminated; whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decision unless the parent or parents voluntarily relinquish physical custody; fail to object to a guardian's appointment; or the parent or parents consent in a notarized written document or by personally appearing in open court with consent (755 ILCS 11-5 (b-1). *In Re: Guardianship of Tatyanna T.* 2012 IL. App. (1st) 112 957: *In Re: A.W. 2013 IL App*. (5th) 130104.

Accordingly, the guardianship statute for a minor provides a protocol like in many states (See, *In Re: H.S.P. v. J.K.* (S. Ct. N.J. App. Div. 435 N.J.Super. 147) (2014) (*HSP*); In re: *Matter of Marcelina M.G. v. Israel S.* (112 A.D. 3d 100 (2013) ("*Marcelina")*, where an undocumented minor child can be declared a ward of the court if it is in the minor's best interests.

Practice Pointer

This may seem complicated. It is not. You can file a guardianship case for a minor whom is undocumented regardless of the minor's immigration status. Your client need not be in foster care. The minor must be only deemed *eligible* for such status, nothing more.

In re: A.M. (2013 IL App. (3d) 120809) (*A.M.*) provides a good analysis of the prerequisites for a valid guardianship judgment in a minor's case. Basically, an Illinois a circuit court lacks jurisdiction if there is a living parent, whose whereabouts are known and whose parental rights have not been terminated and who is willing to make and carry out day-to-day decisions for the minor. Additionally, if such parent is available there is a rebuttable presumption that parent is willing and able to make and carry out such child care decisions. (755 ILCS 5-11 (b).

In *A.M.* a trial court decision to grant guardianship to petitioners was reversed where it failed to conduct a hearing on the adoptive parent's fitness. The latter is distinct from the best interests of the child. The fitness hearing must come first. (*In re: Guardianship of A.G.G.* (406 Ill. App. 3d 389 (2011). If the parent is found fit then the best interest inquiry is not reached.

For a minor, this is significant, not just for state court jurisdictional purposes, but for SIJ eligibility. The Guardianship order should recite the parent has been served with process and has either agreed to the proposed judgment or has been defaulted. Also, the guardianship order should include the following statement:

> This matter comes up on the petition for guardian of (Name), a minor. The petitioner is (Name). After being duly advised the court orders:
>
> 1. The court finds the minor has been neglected, abandoned, or abused by his mother and/or his father. Minor would be eligible for long term foster care in a state agency because of such abandonment, neglect, or abuse. The minor is dependent on the court and a ward of this court.
>
> 2. The court determines that family reunification is no longer viable. The minor is unmarried and under 21 years of age. The court finds that it is not in the best interest of the minor for him to return to his (Country or last country of residence with his parent(s).
>
> 3. Petitioner is appointed guardian of the estate and person of Minor. Bond and surety is waived.

The guardian is awarded care and custody of Minor.

Practice Pointer

The state's court order must make explicit findings, that: (1) abuse, neglect, or abandonment has occurred by 1 or both of the minor's parents; (2) the minor is eligible for long term foster care; is dependent on the court, and family reunification is no longer a viable option; (3) it is not in the minor's best interest to return to the country of which he is a national or last resided with his parents. This is called a "best interests") or predicate order. It is not a finding of SIJ status, that is a federal government decision.

A split in authority exists among state courts as to whether the availability of one parent precludes a state court order finding abandonment, abuse or neglect by a parent. Remember, the state court order is not a finding of SIJ status, it is a predicate to such a finding by the federal government.

The language of the statute says a state court must find that "reunification with 1 or both of the minor's parents is not viable due to abuse, neglect, abandonment, or a similar basis under State law. (8 U.S.C. 1101 (a)(27)(J)(I) The Supreme court of Nebraska interpreting that statute found the "1 or both" language to ambiguous since it might be interpreted to denote that a court could find that either reunification with a single parent is not feasible or reunification with both parents is not feasible. (*In re: Erick M*. 820 N.W. 2d 639 644-647 (2012) Other Courts have found differently. See also, *H.S.P.*, *Marcelina*. No published Illinois precedent discusses this issue.

Practice Pointer

In preparing the state court predicate SIJ order provide that both parents agree to a finding of neglect, abandonment or abuse.

The determination of SIJ status is not confined to a juvenile court. The regulations implementing 8 USC 1101 (A)(27)(j) state that a juvenile court is "a court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles (8CFR 204.11(a)). This could be a probate court, a family court, or any tribunal which has the authority under state law to make decisions about the care and custody of juveniles (see, *Simbaina v. Bunay* Md. 2014 (221 Md.App. 440). Of course, what constitutes a "juvenile court" can vary depending on the state where the case is filed. In California for example, the superior court or trial court which was sitting in probate had the authority to make SIJ findings since no separate jurisdictional basis exists for differentiating between either court. (*B.F. v. Superior Court* 143 Cal. Rptr. 3d 730) (207 Cal.App.4th 621) (2012)

The only limitation on whether a state court judge is constrained in making a SIJ finding is where the minor is in the custody of the federal government. More importantly, a minor is only in constructive custody of the federal government when the minor is subject to a final order of deportation, (*Matter of Perez-Quintanilla*, Special Immigrant Proceeding (AAO 2007) (*Perez*)

The District Director of United States Citizenship and Immigration Services (CIS) denied the SIJ petition of Perez, an 18 year old Nicaraguan national. CIS refused the application on two grounds. First, that the Department of Homeland Security had not specifically consented to a state juvenile court's jurisdiction to determine the minor's custody status. And, the minor had not established his continued eligibility for long term foster care in Florida even though a state court had extended its jurisdiction over the minor.

CIS found Perez to be in the federal government's constructive custody because he was in removal proceedings. The Administrative Appeals Office (AAO) found that decision erroneous. It said specific consent from DHS was not necessary since Perez was not the subject of a final order of deportation (*Pena v. Meissner* 232 F. 3d 896 (9th Cir. 2000).

Also, CIS found Perez was no longer eligible for long term foster care since Florida law said when he turned 18 he was no longer eligible for foster care. (See 8 CFR 204.11 (c)(5)) Of course, Perez was not in foster care and a Florida court in its best interests order had concluded otherwise extending its jurisdiction over Perez until he turned 22 years of age.

The AAO held the crux of the state court's best interests order was that family reunification was no longer a viable option. Whether Perez failed to meet all of Florida's requirements to be placed in foster care was not necessary. The key being that Perez was still dependent on the court and family reunification was not a viable option as stated in the state court's order(s). The CIS ruling denying SIJ status was reversed.

Practice Pointer

Ascertain whether the minor is subject to final order of removal. You can do this by finding out if your client had a removal hearing since he will have an order issued by the Executive Office of Immigration Review (EOIR) showing that fact.

Your client has now received a best interests or predicate order from an Illinois probate, family or juvenile court. S/he still is undocumented for federal immigration purposes. What do you do?

Federal law provides that your client may petition CIS for SIJ status on form I-360. This petition must be supported by among other documentary evidence with:

- the dependency or best interests order of the state court
- a birth certificate or proof of age and identity

Additionally your client can seek adjustment of status to lawful permanent resident status with the filing of form I-485 an application for lawful permanent residence. This can occur even if your client violated the terms of his immigration status or entered the United States without inspection (8 CFR 245.1(a)(1)(ii)(e)(3)) Your client will have to appear for an interview in connection with these applications at CIS. Once approved, your client will be a lawful permanent resident.

Congress, in its wisdom has provided a vehicle to help undocumented foreign children immigrants to achieve lawful immigration status in this country. It did so relying on our state court judges to make determinations of what is in a child's best interests. Although this interplay between state and federal government actors is unusual, it provides a mechanism for us, as advocates, to provide a meaningful remedy. In some small way this article may help you achieve for those among us whom need it most. So, these minor children can find a way home. ■

Patrick M. Kinnally currently serves as Secretary on the International and Immigration Law Section Council of the Illinois State Bar Association. Mr. Kinnally concentrates in general and commercial litigation, immigration and citizenship and administrative, environmental and local government law. Pat can be reached at Kinnally, Flaherty, Krentz & Loran, PC by phone at (630) 907-0909 or by e-mail to pkinnally@kfkllaw.com.

Case update—*Daimler AG v. Bauman*, 134 S.Ct. 746 (2014)

By David W. Aubrey

This article will summarize the Supreme Court opinion, *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014). A companion article will follow in a future issue of The Globe explaining the history of the *Alien Tort Statute*, which was partially the basis for the Court's opinion in *Daimler*. Because the Court's holding in *Daimler* limits the *Alien Tort Statute* via the procedural due process clause of the Fourteenth Amendment, practitioners both of international law, as well as, civil litigation involving multinational corporations, should be well versed in the reasoning of the Court in *Daimler*.

This article prognosticates that the *Daimler* opinion will create substantial litigation over where corporations are "at home" and whether corporations can be "at home" in more than one jurisdiction contemporaneously. In *Daimler*, the Court has narrowed the general jurisdiction exercised by both the states and the federal government over multinational corporations. In sum, the Court reasoned that general jurisdiction exists where a corporation is "at home." Nevertheless, the Court has left open exceptions to that basic premise, which will be discussed below. This author takes the position that while the *Daimler* Court distilled the concept of general jurisdiction; the Court did not abandon the core reasoning of *International Shoe v. Washington*, which found general jurisdiction exists where Defendants are able to plan their activities in order to avoid liability or accept its possibility.

The background of *Daimler* centers on allegations that Mercedes-Benz Argentina collaborated with Argentinian government security forces to kidnap, detain, torture, and kill persons opposed to the Argentinian government. *Daimler*, at 751. These crimes allegedly occurred when Argentina was governed by a military junta during 1976 and 1983 in what is known as the "Dirty War." Id. In 2004, the Argentinian Plaintiffs sued Daimler, the German automobile manufacturer from Stuttgart, as well as Mercedes-Benz USA (hereafter, "MBUSA"), in the United States District Court for the Northern District of California under the *Alien Tort Statute* 28 U.S.C. § 1350 (2014) as well as other causes of action. Id. at 751-52. The Plaintiffs did not dispute that all the alleged injuries occurred in Argentina at a Mercedes-Benz's Argentina plant in Gonzela Catan. Id. at 752. In fact, none of the injuries or acts alleged by the Plaintiffs took place in California. Id.

MBUSA is a subsidiary of Daimler and is a Delaware corporation. *Id.* at 753. Through MBUSA, 2.4% of Daimler's global automobile sales occur in California. *Id.* MBUSA also operates a number of business facilities in the state of California. *Id.* The Defendants filed a motion to dismiss for lack of personal jurisdiction, which was granted by the District Court. *Id*. The Ninth Circuit reversed the District Court and the Supreme Court granted *certiorari*. *Id.*

The question before the Supreme Court was whether the Due Process Clause of the Fourteenth Amendment precluded the District Court from exercising general jurisdiction over this case. *Id.* at 751. As mentioned above, no allegation was made that the atrocities occurred in California. *Id.* The Plaintiffs claimed that California is a jurisdiction where Daimler may be sued on any and all claims against it, wherever in the world those claims arise. *Id.* The Supreme Court disagreed, affirming the District Court's ruling, explaining, "Exercises of personal jurisdiction so exorbitant, we hold, are barred by due process constraints on the assertion of adjudicatory authority." *Id.*

The Court reasoned further that allowing California the global reach over events rooted in Argentina would give all states where many Mercedes-Benz cars are sold exorbitant exercises of general jurisdiction. *Id.* at 761. Granting states this authority would not permit foreign defendants any ability to structure their conduct in a manner that assures them whether or not their conduct will render them liable to lawsuits. *Id.* at 761-62.

Thus, based on this reasoning, a corporate person unlike a human person might be "at home" in more places than one. The inquiry should be whether the corporation has the ability to predict that its conduct will render them liable to lawsuits. So, for example, *Daimler* should not be read to hold that California could not exercise general jurisdiction over MBUSA and Daimler cannot defective cars sold in Nevada since both entities sell cars in California. Suits in California for products that are also sold in California by a defendant are foreseeable; even if the specific injury occurs elsewhere.

In *International Shoe*, the Court had explained that a state's general jurisdiction exists in situations where a foreign corporation's, "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." Id. at 754; citing *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945). Later the Court expounded further that general jurisdiction exists where a corporations affiliations are so continuous and systematic as to render the corporation essentially at home in the forum State. *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408, 414, n. 9 (1984) (emphasis added). Nowhere in the *Daimler* opinion did the Court write that *International Shoe* or *Helicopteros* had been overruled. Instead, the notion that general jurisdiction exists for states to exercise over events that occur anywhere in the world was rejected.

Moreover, the Court explicitly declined to rule on the question whether a foreign corporation may be subjected to a state-court's general jurisdiction based on the contacts of its in-state subsidiary. *Daimler*, at 759. In addition, the Court left open that exceptions exist where a corporations operations in a forum, other than the place of incorporation, may be so substantial that a corporation can be rendered at home in that state. Id. at 761, n. 19.

Last, the Court's opinion recognized the limited role given to the Judicial Branch in United States foreign policy by citing risks to international comity, which might arise from expansive general jurisdiction. *Id.* at 762. The Court observed, that in the European Union, a corporation may generally be sued in the nation where it is "domiciled." *Id.*; *citing* European Parliament and Council Reg. 1215/2012, Arts. 4(1), and 63(1), 2012 O.J. (L. 351) 7, 18. "Domicile," in the European statutes, refers only to the location of the corporation's "statutory seat," "central administration," or "principal place of business." *Id*. Thus, international rapport was considered by the Court in its holding that subjecting Daimler to the general jurisdiction of courts in California would not accord Fourteenth Amend-

ment. *Id.*

In conclusion, practitioners both of international law, as well as, civil litigation involving multinational corporations, should be well versed in the reasoning of the Court in *Daimler*. This article predicts that the *Daimler* opinion will create substantial litigation over where corporations are "at home" and whether corporations can be "at home" in more than one jurisdiction contemporaneously. The core reasoning in *Daimler* requires courts and litigants to determine whether the defendant had the opportunity to plan his activities in such a way as to avoid liability in the forum jurisdiction. Thus, while *Daimler* narrows the idea of general jurisdiction, it has not abandoned the rational of *International Shoe*. ■

David 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. He is with Gori Julian & Associates, P.C. in Edwardsville, Il and can be reached at Phone: 618-659-9833; E-Mail: *David@gorijulianlaw.com*

Career panel on immigration and international law at Southern Illinois University School of Law

By David W. Aubrey, Esq., Edwardsville, Illinois

On March 27, 2015, the International Law Society at Southern Illinois University School of Law hosted a career panel on jobs related to international law, which featured three members of the Illinois State Bar Association Section on International & Immigration Law. The panel featured Scott Pollock, Michelle Rozovics, and David W. Aubrey. The event was well attended, especially for a Friday afternoon, with more than twenty law students participating. The law school provided refreshments following the remarks and Question & Answer session.

Presenting first, Scott Pollock framed his remarks using his own biography, which led him from New York City to Chicago, where he has practiced for many years. Today, he heads a firm providing immigration litigation services for employment based immigration, family reunification, political asylum litigation, counseling on Deferred Action for Childhood Arrivals, and deportation defense. Scott presented case studies from his own experiences, which helped the students understand the great diversity of practice that exists within immigration litigation.

David Aubrey spoke about the intersection of international litigation with American civil litigation. David largely represents plaintiffs of wrongful death suits arising from defective products and large accidents, such as trucking accidents. David explained the basic requirements for service abroad through what is commonly known as the Hague Service Convention. David also compared and contrasted the different types of civil legal systems, such as the Common Law system versus the civil codes used on the European Continent. Pitfalls exist in transnational litigation in discovery, depositions, and the role of the attorneys as adversaries. Last, David shared his thoughts on the Supreme Court's most recent decisions on personal jurisdiction, which have narrowed states' general jurisdiction under the Fourteenth Amendment's procedural due process doctrine.

Michelle Rozovics presented third and focused her thoughts on helping students understand the unique relationship of an attorney whose clients are business owners. Michelle explained that early in her career she recognized that small businesses whom desired to operate in a multinational market might be better served by a small or medium sized firm, rather than a large firm. Thus, she built her practice in international transactions by providing services to those types of corporate clients. Michelle also shared about her experiences lecturing on law in both Poland and Russia. Finally, Michelle moderated the question and answer portion of the event following the remarks of all three attorneys.

In sum, the career panel was a success for both the International Law Society at Southern Illinois University School of Law and the Illinois State Bar Association Section on International & Immigration Law. Hopefully in the next year more events like this will occur giving law students around Illinois concrete advice on practicing international law here in Illinois. ■

NEED IT NOW?
Fastbooks
are available for many of these titles.

ILLINOIS STATE BAR ASSOCIATION

ISBA Books

Picking a Civil Jury: A Guide for Illinois Trial Lawyers

Bundled with a free Fastbook PDF download!

As part of the ISBA's Practice Ready Series, this book is specifically designed to be a must-have resource for new attorneys and others wishing to brush up on their jury selection skills. It concisely walks you through each stage of picking a jury, from making the initial jury demand to challenging jurors during trial. The guide not only covers the procedural mechanics of jury selection, but also includes chapters on voir dire strategies, the psychology of picking a jury, and using the Internet in jury selection. Statutory and case law citations are provided throughout and most chapters include a list of helpful practice tips. **The book is written by respected trial lawyer Michael J. Salvi and his son, Alexander.** *Order your copy today!*

HOW TO ORDER
All prices include tax and postage.

ONLINE:
Go to "Bookstore" under "Publications" at isba.org (http://www.isba.org/store)

E-MAIL:
Contact Janet at Jlyman@isba.org

PHONE:
Call Janet at 217-525-1760 or 800-252-8908.

For a complete list of titles, visit www.isba.org/store

RECENT RELEASES

The Illinois Rules of Evidence Combo - *Buy both and save!*

$45.50 mbr./$66.00 nonmbr.

The Illinois Rules of Evidence: A Color-Coded Guide – 2015 Edition. This brand-new edition of Gino L. DiVito's color-coded analysis of the Illinois Rules of Evidence is updated through January 12, 2015. Its three-column format allows easy comparison of the Illinois rules with the Federal Rules of Evidence (both pre-2011 amendments and as amended effective December 1, 2014). DiVito, a former appellate justice, is a member of the Special Supreme Court Committee on Illinois Rules of Evidence, the body that formulated the rules and presented them to the Illinois Supreme Court. *The book the judges read! Also sold individually.*

Illinois Rules of Evidence - ISBA's 2015 pocket-size edition. This update of ISBA's pocket-size edition reflects all rule changes through January 10, 2015. The amazingly affordable booklet, which contains the complete rules plus commentary, is perfect for depositions, court appearances – anywhere you need a quick reference. *Buy one now for everyone in your office! Also sold individually.*

Rules Governing the Legal Profession and Judiciary in Illinois: January 2015

This handy reference guide conveniently brings together all of the rules governing the legal profession and judiciary in Illinois. It includes the Illinois Code of Judicial Conduct, the Illinois Supreme Court Rules on Admission and Discipline of Attorneys, the Illinois Rules of Professional Conduct, the Rules of the ARDC, and the Rules of the Board of Admission and Committee on Character and Fitness. $15.00 mbr./$25.00 nonmbr.

Guide to Illinois Statutes of Limitations and Repose – 2014 Edition

The new Guide to Illinois Statutes of Limitations contains all Illinois civil statutes of limitations enacted and amended through September 15, 2014, with annotations. This quick reference guide brings together provisions otherwise scattered throughout the Code of Civil Procedure and various chapters of the Illinois Compiled Statutes, and also provides deadlines, court interpretations, and a handy index listing statutes by Act, Code or Subject. $35.00 mbr./$50.00 nonmbr.

Basic Residential Real Estate: From Contract to Closing

Featuring the new Multi-Board Residential Real Estate Contract 6.0!

As the first title in the ISBA's new Practice Ready Series, this book was specifically written to be a must-have resource for new attorneys and any others new to residential real estate transactions. It walks you through each stage of a common transaction, from the moment a client contacts your office to the essential steps you must take after the transaction closes. The book centers on and provides in-depth discussion of the use of the new Multi-Board Residential Real Estate Contract 6.0, one of the most widely used contracts of its kind in Illinois. It includes a 130-page appendix with sample copies of the common documents you will encounter in a residential real estate transaction – client letters, the Multi-Board Residential Real Estate Contract 6.0, contingency letters, financing documents, title company documents, closing documents, and many others. Order your copy today and don't risk seeing these documents for the first time at your first closing! $35.00 mbr./$50.00 nonmbr.

GENERAL TOPICS

A Practical Guide to the Illinois Domestic Violence Act

If you take family law cases, you'll find this book an essential aide. Although intended primarily for attorneys who practice in civil court, this book is also valuable for assistant state's attorneys and domestic violence advocates. It provides a clear and comprehensive understanding of the Act, and can be used as a quick reference for researching specific problems. Prepared by attorney Jan Russell from the Chicago Police Department, a highly-rated trainer on domestic violence and child abduction issues who has trained more than 15,000 police officers, lawyers, and social service providers from Florida to Hawaii. $40 mbr./$50 nonmbr.

Illinois Decisions on Search and Seizure: 2014 Edition

This comprehensive compendium of case summaries is fully updated with decisions issued prior to December 18, 2013. It includes all relevant Illinois and federal decisions, and is a great starting point for any questions related to search and seizure. A must have for all criminal defense attorneys and prosecutors! $45.00 mbr./$60.00 nonmbr.

Guide to Sentencing and Bond Hearings in Illinois: 2014 Edition

This essential guide for criminal defense attorneys and prosecutors condenses everything you need to know before appearing at a sentencing or bond hearing. It includes a comprehensive sentencing guide, bond hearing guide, and a detailed listing of the most common felony offenses, which provides statutory citations, offense classes, and relevant notes. $35 mbr./$49 nonmbr.

Guide to Illinois Statutes for Attorneys' Fees – 2014 Edition

The 2014 edition of this essential guide lists all provisions in the Illinois Compiled Statutes that authorize the court to order one party to pay the attorney fees of another. No matter what your practice area, this book will save you time – and could save you and your clients money! $37.50 mbr./$52.50 nonmbr.

ISBA Family Law Handbook - 2011 Edition

This comprehensive, must-have practice handbook covers nearly everything for general practitioners who handle family law matters. Written by 36 authors who concentrate in the field and edited by John Marshall Professor Cynthia D. Bond, the handbook is a complete update of an ISBA bestseller from the mid-90s. Topics include jurisdiction, pre-marital agreements, settlement agreements, modification of judgments, mediation, custody and visitation, assisted reproductive technology, grandparent visitation, guardians ad litem, property, support and finances, maintenance, child support, civil unions, immigration law, discovery, appeals, insurance matters, property valuation, adoption, paternity, and much more. Add it to your collection today! $60.00 mbr./$90.00 nonmbr.

Post-Conviction Practice: A Manual for Illinois Attorneys

Representing a client in a post-conviction case? This manual will guide you through the many complexities of Illinois post-conviction law. Remember, your client already lost, twice – once at trial and again on appeal. He or she needs a new case, which means going outside the record, investigating the facts, mastering the law, and presenting a compelling petition. Andrea D. Lyon, director of the DePaul College of Law's Center for Justice in Capital Cases, and her team of co-authors help you do just that. $30.00 mbr./$40.00 nonmbr.

Upcoming CLE programs

To register, go to www.isba.org/cle or call the ISBA registrar at 800-252-8908 or 217-525-1760.

July

Wednesday, 7/1/15- Teleseminar— Outsourcing Agreements. Presented by the ISBA. 12-1.

Thursday, 7/2/15- Teleseminar—Planning with Life Insurance Trusts. Presented by the ISBA. 12-1.

Tuesday, 7/7/15- Teleseminar—Business Planning with Series LLCs. Presented by the ISBA. 12-1.

Wednesday, 7/8/15- Teleseminar—Ethical Issues When Representing the Elderly—LIVE REPLAY. Presented by the ISBA. 12-1.

Thursday, 7/9/15- Teleseminar—Settlement Agreements in Litigation- LIVE REPLAY. Presented by the ISBA. 12-1.

Tuesday, 7/14/15- Teleseminar—Tax Planning for Real Estate, Part 1. Presented by the ISBA. 12-1.

Wednesday, 7/15/15- Teleseminar—Tax Planning for Real Estate, Part 2. Presented by the ISBA. 12-1.

Tuesday, 7/21/15- Teleseminar—Restrictive & Protective Covenants in Real Estate. Presented by the ISBA. 12-1.

Wednesday, 7/22/15- Teleseminar—Fiduciary Duties & Liability of Nonprofit/Exempt Organization Directors and Officers. Presented by the ISBA. 12-1.

Thursday, 7/23/15- Teleseminar—Ethics and Digital Communications- LIVE REPLAY. Presented by the ISBA. 12-1.

Friday, 7/24/15- Teleseminar—Estate Planning for Farms and Ranches- LIVE REPLAY. Presented by the ISBA. 12-1.

Tuesday, 7/28/15- Teleseminar—Business Planning with S Corps, Part 1. Presented by the ISBA. 12-1.

Wednesday, 7/29/15- Teleseminar—Business Planning with S Corps, Part 2. Presented by the ISBA. 12-1.

Thursday, 7/30/15- Teleseminar—Eminent Domain, Part 1- LIVE REPLAY. Presented by the ISBA. 12-1.

Friday, 7/31/15- Teleseminar—Eminent Domain, Part 2- LIVE REPLAY. Presented by the ISBA. 12-1.

August

Tuesday, 8/4/15- Teleseminar—Construction Agreements, Part 1. Presented by the ISBA. 12-1.

Wednesday, 8/5/15- Teleseminar—Construction Agreements, Part 2. Presented by the ISBA. 12-1.

Tuesday, 8/11/15- Teleseminar—Estate Planning with Annuities & Financial Products. Presented by the ISBA. 12-1.

Thursday, 8/13/15- Teleseminar—2015 in Age Discrimination Update. Presented by the ISBA. 12-1.

Friday, 8/14/15- Teleseminar—Ethical Issues in Buying, Selling, or Transferring a Law Practice. Presented by the ISBA. 12-1.

Tuesday, 8/18/15- Teleseminar—Business Divorce: When Business Partners Part Ways, Part 1. Presented by the ISBA. 12-1.

Wednesday, 8/19/15- Teleseminar—Business Divorce: When Business Partners Part Ways, Part 1. Presented by the ISBA. 12-1.

Thursday, 8/20/15- Teleseminar—Easements in Real Estate. Presented by the ISBA. 12-1.

Monday, 8/24/15- Teleseminar—Like-Kind Exchanges of Business Interests- LIVE REPLAY. Presented by the ISBA. 12-1.

Tuesday, 8/25/15- Teleseminar—Estate Planning for Guardianship and Conservatorships. Presented by the ISBA. 12-1.

September

Tuesday, 9/1/15- Teleseminar—Estate & Trust Planning With the New 3.8% on Income. Presented by the ISBA. 12-1.

Wednesday, 9/2/15- Teleseminar—Drafting Service Agreements in Business. Presented by the ISBA. 12-1.

Thursday, 9/3/15- Teleseminar—Drafting Effective Employee Handbooks- LIVE REPLAY. Presented by the ISBA. 12-1.

Friday, 9/4/15- Teleseminar—Rights of First Refusal/Rights of First Offer in Transactions. Presented by the ISBA. 12-1.

Tuesday, 9/8/15- Teleseminar—Ethics and Pre-Trial Investigations. Presented by the ISBA. 12-1.

Thursday, 9/10/15- Teleseminar—Selling Closely-Held Companies to Employees, Part 1- LIVE REPLAY. Presented by the ISBA. 12-1.

Friday, 9/11/15- Teleseminar—Selling Closely-Held Companies to Employees, Part 2- LIVE REPLAY. Presented by the ISBA. 12-1.

Tuesday, 9/15/15- Teleseminar—Planning to Obtain Tax Free Treatment in Business Combinations. Presented by the ISBA. 12-1.

Wednesday, 9/16/15- Teleseminar—Duress & Undue Influence in Estate and Trust Planning- LIVE REPLAY. Presented by the ISBA. 12-1.

Wednesday, 9/16/15- Live Studio Webcast—Litigating the Municipal Division Case: "Small" Cases Can Create Big Headaches. Presented by the ISBA Tort Law Section. 10:30-noon.

Thursday, 9/17/15- Chicago, ISBA Regional Office—Complex Asset Recovery: Fraudulent Transfers, Offshore Assets & Charging Orders. Presented by ISBA Commercial Banking, Collections and Bankruptcy Section. 8:45-12:15 pm.

Thursday, 9/17/15- Live Webcast—Complex Asset Recovery: Fraudulent Transfers, Offshore Assets & Charging Orders. Presented by ISBA Commercial Banking, Collections and Bankruptcy Section. 8:45-12:15 pm. ■

The Globe
Illinois Bar Center
Springfield, Illinois 62701-1779
June 2015
Vol. 52 No. 8

Non-Profit Org.
U.S. POSTAGE
PAID
Springfield, Ill.
Permit No. 820