

# ALR 5th

## Alert

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### From the editor

The next two volumes of ALR5<sup>th</sup> feature a pair of “twin” annotations on issues relating to the ever-fruitful fields of environmental protection and insurance. At first glance the annotations appear indeed to be the same, much as identical twins appear at first glance to be the same person, as they both cover the issue of coverage exclusion for environmental pollution in a liability insurance policy. However, these annotations, one of which is expected to appear in each of volumes 97 and 98, are mutually exclusive in coverage, as the annotation in volume 97 deals with a qualified pollution exclusion clause in the insurance contract, while the annotation in volume 98 covers an absolute exclusionary clause. The differences in construction and effect of the two types of clauses are worthy of comparison reading.

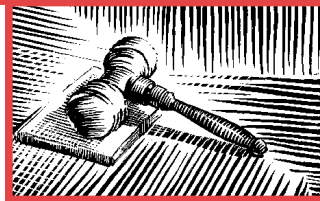
Russell G. Donaldson, J.D.

## Highlights

### HIGHWAYS AND STREETS

#### Transportation Impact Fees

Few today should be unaware of the fact that an ever-expanding population has placed considerable strain on urban and suburban infrastructures planned and put in place during the 20th Century, such as water and gas utilities, waste disposal systems, and transportation facilities. Local governmental units forced to upgrade these infrastructures have frequently sought new devices for financing the improvements. Among these financing devices is the so-called “development impact fee,” which attempts to place the burden more directly on those directly benefited by the improvements than would be the case if the



improvements were funded by general revenues collected from the population at large. The fee is imposed on those who seek to develop a parcel of land, and usually represents a predetermined proportion of the cost of the particular improvement rendered necessary by the

increased population pressure of the development itself. This annotation focuses on impact fees sought to be imposed on developers for road, street, or highway improvements in particular, analyzing and explaining the cases that have considered the validity, construction, and application of these funding devices. Of particular note is the subdivision in which the courts have tried to determine just what class of impost these fees most nearly resemble, in an attempt to analogize them to familiar forms so

as to gain an insight on the kind of governmental authority that is exercised in the enactment of the fee, and hence the level and nature of authority necessary to validate the fee as within the power of the local governmental entity. [97 ALR5th 123](#)

## **DOUBLE JEOPARDY**

### **Conviction or Acquittal in Federal Court as Bar to State Prosecution on Same Facts**

The basic essence of the Double Jeopardy Clause of the Fifth Amendment provides that an individual may not be tried twice for the same offense. However, the doctrine of dual sovereignty provides that a prosecution by the federal government does not preclude a state prosecution for the same offense due to the independent nature of each sovereign to enact laws. Many states have enacted statutes prohibiting successive prosecutions, yet permit certain exceptions, based on the dual sovereignty doctrine. Courts examining this issue generally examine the language of such statutes closely to determine if the factual situation in the case before it warrants a prohibition against a successive prosecution. This annotation collects and analyzes cases examining the issue of whether, and under what circumstances, a prior federal prosecution prohibits a successive state prosecution for offenses arising out of the same incident or conduct. [97 ALR5th 201](#)

## **INSURANCE**

### **Liability Coverage for Invasion of Private Occupancy Right**

The phrase, "invasion of the right of private occupancy," is widely used in comprehensive general liability insurance policies and has been the subject of heated litigation throughout the country. The phrase is usually included within the policy's definition of "personal injury" coverage, and is often part of the phrase, "wrongful evictions from, wrongful entry into, or [other] invasion of the right of private occupancy." To keep the present annotation to a workable size, however, its scope has been limited to invasions of the right of private

occupancy by means other than the common circumstances of wrongful eviction or wrongful entry. Consequently, the annotation deals with such matters as physical defects or conditions making the premises difficult or impossible to actually occupy, such as inundations or nuisances, or nonphysical difficulties such as discriminatory treatment against the occupants, interference with contractual relations, or the like. A subdivision on general principles applicable to an insurer's liability under such a clause is followed by detailed examination of the application of these principles to the varied factual situations that have actually occurred in real life. [97 ALR5th 473](#)

## **JUDGES**

### **State Provisions for Appointment of Special or Temporary Judges**

With the ever-increasing burdens imposed on state and local judiciaries by a society that grows daily in numbers, complexity, and unwieldiness, it has become increasingly necessary in recent years for courts to find special or temporary judges to help them meet their obligations to the public. This annotation examines the measures taken by states and their governmental subdivisions to provide mechanisms for the filling of these important auxiliary positions within the judiciary. The annotation covers questions such as what courts such special or temporary judges can serve in; formal requisites for service including such matters as residency, professional status, age and performance of technical requirements including an oath of office if necessary; and the actual means of filling the position of special judge, whether by election, appointment, or other basis for designation. In addition, the annotation examines general questions relating to the nature and extent of authority that such a judge may exercise in the performance of judicial duties. All this is tied to the extensive existing ALR coverage of the nature and exercise of judicial authority by thorough references in a subsection exclusively devoted to related annotations. [97 ALR5th 537](#)

# **Coming Soon**

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Listed below are a few of the topics scheduled to be published in volume 98 of ALR5th, in April 2002. Some of the annotations listed may be rescheduled.



## **TELECOMMUNICATIONS**

### **State Regulation of Internet Communications**

With the prevalent use of the Internet for both commercial and noncommercial purposes, several states have attempted to regulate both the content and the manner of Internet communications. The statutes are generally designed to prevent the dissemination of communications harmful to minors or to protect innocent users from fraud and deception in commercial transmissions. The validity of several of these statutes has been challenged on constitutional grounds, with the invocation of the protections provided by the First Amendment and the dormant Commerce Clause of the United States Constitution. This annotation collects and discusses cases considering the validity of state statutes regulating Internet communications under the First Amendment and the Commerce Clause of the U.S. Constitution. **98 ALR5th**

## **CONTRACTS**

### **Moral or Natural Obligation as Consideration**

While the basic rule is that a mere moral obligation is not a valid consideration for a contract, the courts have recognized a number of occasions where a moral obligation may provide a valid consideration, such as where the moral obligation arises from a pre-existing legal liability and is acknowledged by a new promise, or where one party has obtained a benefit or suffered a legal detriment, or where the courts have refused to rescind agreements supported by moral consideration where the contracts had been wholly or partially executed. This annotation collects and discusses all the state and federal cases discussing whether, and under what circumstances, a moral or natural obligation can serve as consideration for a contract. **98 ALR5th**

## **PRISONS AND PRISONERS**

### **Adequacy of Legal Research Facilities for Prisoners**

Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying a penal system. These constraints on inmates are necessary to accommodate a myriad of institutional needs and objectives of prison facilities and serve incidentally as reminders that, under the justice system, deterrence and retribution are factors in addition to correction. A prison regulation which impinges on prison inmates' constitutional rights is valid if it is

reasonably related to legitimate penological interests, and prison officials are not required to adopt the least restrictive alternative to accommodate a prisoner's constitutional complaint. Prisoners have the constitutional right to petition the government for redress of their grievances, which includes the right of access to the courts to challenge unlawful convictions and to seek redress for violations of their constitutional rights. Denial or undue restriction of this right is a denial of due process of law under the Fourteenth Amendment. Prison policies and practices will not be allowed to operate so as to deprive a prisoner of the right to reasonable access to the courts. Before procedures that impede a prisoner's access to the courts may be constitutionally validated, it must be clear that the state's substantial interests cannot be protected by less restricted means. A number of courts have faced the issue of the adequacy of a prisoner's access to legal research facilities. This annotation collects and discusses the state and federal cases in which the courts have discussed the sufficiency of access to legal research facilities afforded to a person confined in a state prison or local jail. **98 ALR5th**

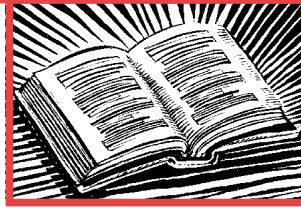
## **NEGLIGENCE**

### **Negligent Credentialing of Physician**

Medical malpractice recoveries are not always limited to the tortious physician or the physician's malpractice insurer. There may also be a cause of action against the physician's employer or the hospital or health care provider holding out the physician as qualified where there is provable negligence in so holding out or "credentialing" the physician. Using, as a starting point, caselaw permitting the employer of negligently-retained independent contractors to be held directly liable to persons injured by them, many courts have adopted the tort of negligent credentialing of, or the negligent granting of staff privileges to, independent physicians. Often, courts have had to reconcile this recently recognized cause of action with the procedures and the limitations imposed on medical malpractice cases which typically give rise to negligent credentialing claims. This annotation examines the tort of negligent credentialing of physicians, analyzing the reported cases for their views on the elements of the tort, defenses to the action, and procedural matters relevant thereto, including a wealth of particular instances where liability was or was not established. **98 ALR5th**

# Index

The following is a complete list, arranged alphabetically by topic, of annotations contained in the current volume 96 or scheduled for publication in volume 97 of ALR5th. Some of the annotations listed may be rescheduled.



## ATTORNEYS AT LAW

Constitutional Validity of Continuing Legal Education Requirements for Attorneys. [97 ALR5th 457](#)

## CIVIL RIGHTS

Destruction of Property as Violation of Fourth Amendment. [98 ALR5th](#)

## CONTRACTS

Moral or Natural Obligation as Consideration for Contract. [98 ALR5th](#)

## CORONERS AND MEDICAL EXAMINERS

Civil Liability in Conjunction with Autopsy. [97 ALR5th 419](#)

## CRIMINAL LAW

Conviction or Acquittal in Federal Court as Bar to Prosecution in State Court for State Offense Based on Same Facts—Modern View. [97 ALR5th 201](#)

## ENVIRONMENT

What Constitutes “Pollutant,” “Contaminant,” “Irritant” or “Waste” Within Meaning of Qualified Pollution Exclusion in Liability Insurance Policy. [97 ALR5th 359](#)

What Constitutes “Pollutant,” “Contaminant,” “Irritant” or “Waste” Within the Meaning of Absolute or Total Pollution Exclusion in Liability Insurance Policy. [98 ALR5th](#)

## HIGHWAYS AND STREETS

Validity, Construction, and Application of Road or Transportation Impact Fee Statutes or Ordinances. [97 ALR5th 123](#)

## INSURANCE

Advertising Injury Insurance. [98 ALR5th](#)

Construction and Application of “Invasion of the Right of Private Occupancy” Clause in Comprehensive

General Liability Policy. [97 ALR5th 473](#)  
Loss or Impairment of Vision as Within Meaning of Total Disability Clause. [98 ALR5th](#)

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Construction and Validity of State Provisions Governing Designation of Substitute, Pro Tempore, or Special Judge. [97 ALR5th 537](#)

## NEGLIGENCE

Relationship Between Victim and Plaintiff-witness as Affecting Right to Recover Under State Law for Negligent Infliction of Emotional Distress Due to Witnessing Injury to Another Where Bystander-plaintiff is not Member of Victim’s Immediate Family. [98 ALR5th](#)

Tort Claim for Negligent Credentialing of Physician. [98 ALR5th](#)

## PRISONS AND PRISONERS

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## TELECOMMUNICATIONS

Validity of State Statutes and Administrative Regulations Regulating Internet Communications under the Commerce Clause and First Amendment of the Federal Constitution. [98 ALR5th](#)

## WORKERS’ COMPENSATION

Right to Workers’ Compensation for Emotional Distress or Like Injury Suffered by Claimant as Result of Nonsudden Stimuli—Right to Compensation Under Particular Statutory Provisions. [97 ALR5th 1](#)

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