

# ALR Federal

## Alert

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### From the editor

There have been plenty of cases, and more seem to arrive every day, from convicts confined to prison, or similar correctional facilities, seeking to enforce their admittedly limited civil rights against real or imagined infringements. But what of the civil rights of persons convicted of crimes but not currently in confinement? A pair of unusual annotations in Volume 176 touch on this unusual situation, with one annotation discussing the effect on participation in a civil suit by a fugitive from justice, and another discussing the necessity, for purposes of a habeas corpus petition, that the petitioner be actually in confinement at the time the petition is heard.

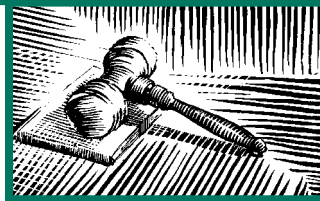
Russell G. Donaldson, J.D.

## Highlights

### TAXATION

#### Equitable Estoppel of IRS

The Supreme Court has made it clear that however heavy the burden might be when an estoppel is asserted against the Government, a private party cannot prevail without at least demonstrating that the traditional elements of an estoppel are present. The traditional elements of equitable estoppel are: (1) the party to be estopped knows the facts; (2) the party intends that its conduct will be acted on or must so act that the party invoking estoppel has a right to believe it is so intended; (3) the party invoking estoppel must be ignorant of the true facts; and (4) the party must detrimentally rely on the former's conduct. It has been implied by the Supreme Court, and held by all but one of the federal circuits as well as the United States Tax Court, that when a party seeks to invoke equitable estoppel against the federal government, including the Internal Revenue Service (IRS), there



must also be a showing that the agency engaged in affirmative conduct going beyond mere negligence. Federal and Tax Court cases which have discussed a taxpayer's assertion of equitable estoppel against the IRS based on representations of IRS or non-IRS employees are

collected in this annotation. [176 ALR Fed 33](#)

### ENDANGERED SPECIES ACT

#### Critical Habitat

In 1973, Congress enacted the Endangered Species Act (ESA), 16 U.S.C.A. §§1531-1544, to provide a program for the conservation of endangered and threatened species, and for the preservation of their ecosystems, recognizing that economic growth and "untempered" development had resulted in the extinction of various species of fish, wildlife, and plants in the United States at an alarming rate. Accordingly, ESA: (1) mandated a listing procedure for threatened and endangered spe-

cies; (2) prohibited actions—both in the public and private sector—that resulted in a “taking” of a listed species; (3) established procedures for land acquisition; and (4) provided for federal cooperation with the states and interagency consultation. During the congressional debate on ESA, the importance of habitat for species survival was emphasized. After the United States Supreme Court’s decision in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117 tested ESA’s critical habitat provision in 1978, Congress quickly amended ESA to define critical habitat as a specific geographical area occupied by a species, and to provide the Secretary of the Interior with criteria for determining critical habitat, in which economic considerations played a role. This annotation collects cases that have addressed the designation of a critical habitat under ESA. [176 ALR Fed 405](#)

## PENSIONS AND RETIREMENT FUNDS

### Wrongful Discharge—ERISA Preemption

When enacting the Employee Retirement Income Security Act of 1974 (ERISA), Congress included various safeguards to prevent abuses and to completely secure the rights and expectations brought into being by this landmark reform legislation. One of the most significant of these safeguards is ERISA’s broad pre-emption provision, found at 29 U.S.C. § 1144(a) (Section 514), which pre-empts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA. State laws regulating insurance, banking, or securities are expressly exempt from this pre-emption provision, as are generally applicable state criminal laws. This annotation explores the question whether a state cause of action for wrongful discharge “relates” to ERISA so as to be pre-empted thereby. The annotation points out that the key criterion for pre-emption is not whether the discharge in

question has an effect relating to ERISA, but whether the motivation for the discharge relates to issues within ERISA’s scope, such as the avoidance of pension or benefit responsibilities attendant on continuation of the employment relationship or discipline relating to ERISA duties of the discharged employee. [176 ALR Fed 433](#)

## CIVIL PROCEDURE

### Federal Courts: Abstention

The United States Supreme Court has recognized, under what is known as the Colorado River doctrine, that in certain circumstances it may be appropriate for a federal court to refrain from exercising its jurisdiction to avoid duplicative litigation resulting when there is a concurrent foreign or state court action. In addressing what constitutes duplicative litigation, the courts have framed the question as whether concurrent state and federal suits are “parallel,” and the question of what constitute parallel proceedings has frequently been before the federal courts. For example, in *Al-Abood ex rel. Al-Abood v. El-Shamari*, 217 F.3d 225, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 9934 (4th Cir. 2000), the court was faced with whether suits pending in Monaco and in federal court were parallel. The court observed that in the Monacan proceedings the central issue was whether a trust was created and whether the federal plaintiff confiscated any of the trust funds, while in the federal court proceeding, the issue was whether the defendants committed fraudulent acts to bilk money from the plaintiff. The court agreed that the proceedings had certain facts and arguments in common, but believed the issues were not substantially the same. This annotation collects and analyzes cases in which federal courts have discussed whether a concurrent state or foreign action is parallel to a federal action for the purpose of Colorado River abstention. [176 ALR Fed 517](#)

# Coming Soon

## TRADEMARKS AND TRADE NAMES

### Anticybersquatting Act

As the internet expanded in usage, functionality, and economic importance during the 1990s, a practice grew up of registering internet domain names for which the registrant had no legitimate use, either for the purpose of selling them to those who would naturally have a use for those names, for the sake of depriving the natural users of the perfect domain names, for selling the registrant’s own products under the guise of association with the products and reputation of the natural user, or for other “improper” purposes. This practice has been dubbed “cybersquatting” or



“cyberpiracy,” and in 1999, Congress enacted legislation to discourage the practice. Known as the “Anticybersquatting Consumer Protection Act (ACPA) and classified to 15 U.S.C.A. § 1125(d), the statute provides injunctive and monetary relief for holders of “famous” or “distinctive”

trademarks or trade names against persons or entities who have registered internet domain names which are dilutive of, or identical or confusingly similar to, the plaintiffs’ trademarks or trade names, if the registration was done with a “bad faith intent to profit.” The statute supplies a list of 9 factors for use in determining whether the requisite “bad faith” is present with regard to any particular domain name. This an-

notation tracks and analyzes the federal court cases that have dealt with the validity, construction, or application of this ameliorative statute. **177 ALR Fed**

## ALIENS

### Fear of Persecution

One method of establishing refugee status under Section 101(a)(42)(A) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. §1101(a)(42)(A)), is for an alien to demonstrate that he or she is unable or unwilling to return to, and unable or unwilling to avail himself or herself of the protection of, the country of his nationality, because of a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. This annotation collects and discusses the cases which have adjudicated the sufficiency of the evidence to establish an alien's well-founded fear of persecution entitling the alien to the status of a refugee under §101(a)(42)(A) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. §1101(a)(42)(A)) concerning alleged persecution in African and Oceanian nations. **177 ALR Fed**

## NATIONAL PARKS

### Premises Liability

Damages may be recovered under the Federal Tort Claims Act (FTCA) (28 U.S.C.A. §§1346(b), 2671 et seq.) for the death or injury of a visitor occurring in an area administered by the National Park Service (NPS). Such claims may be barred, however, under the discretionary function exception to the Act's waiver of sovereign immunity since decisions made by NPS personnel often involve policy considerations in carrying out the agency's mandate established by Congress in creating the NPS under 16 U.S.C.A. § 1 to conserve the scenery and the natural and historic objects and wildlife, and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations. In *Shansky v. U.S.*, 164 F.3d 688 (1st Cir. 1999), the court held that

the discretionary function exception to the FTCA's waiver of sovereign immunity barred the claim of a visitor who was injured in a fall on steps at a national historic site because the discretion exercised by the NPS in choosing which safety measures to install at the site was policy-driven in view of the aesthetic considerations involved in rehabilitating the site and the absence of any particular directive governing the rehabilitation. This annotation discusses those cases in which the courts have considered the liability of the United States for the death or injury of a visitor at an area administered by the NPS. **177 ALR Fed**

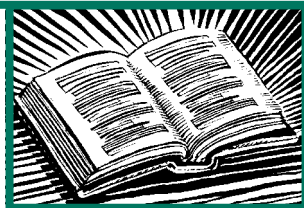
## MONOPOLIES AND RESTRAINTS OF TRADE

### *Noerr-Pennington*: Sham exception

Through the *Noerr-Pennington* immunity doctrine, the United States Supreme Court has carved out an anti-trust exemption for joint efforts to influence governmental action. Relying for support on the right to petition the government for redress of grievances as well as the right of free association contained in the First Amendment to the United States Constitution, U.S.C.A. Const. Amend. 1, the Supreme Court has applied the doctrine in the context of petitioning a legislature for the passage of laws with anticompetitive intent, petitioning the executive for the enforcement of laws, and petitioning for relief before a court or administrative agency. However, the petitioning of governmental bodies, whether legislative, executive, administrative or judicial, does not qualify for *Noerr-Pennington* immunity if it is a mere sham to cover an attempt to interfere directly with the business relationships of a competitor, the Court has held. Federal courts have examined and applied the "sham" exception to application of this doctrine in the context of petitioning a legislative or executive body. These decisions, which have addressed the "sham" exception to application of the *Noerr-Pennington* doctrine, exempting from federal antitrust laws joint efforts to influence governmental action based on petitioning a legislative or executive body, are collected in this annotation. **177 ALR Fed**

# Index

The following is a complete list, arranged alphabetically by topic, of annotations contained in the current Volume 176 or scheduled for publication in Volume 177 of ALR Federal. Some of the annotations listed may be rescheduled.



## ABSTENTION

When are Proceedings Parallel So As To Permit Federal Court Abstention Under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483. **176 ALR Fed 517**

## ALIENS

Illegal Reentry Under § 276 of Immigration and Nationality Act (8 U.S.C.A. § 1326) of Alien Who Has Been Denied Admission, Excluded, Deported, or Removed or Has De-

parted United States While Order of Exclusion, Deportation, or Removal Is Outstanding. **177 ALR Fed**  
Sufficiency of Evidence to Establish Alien's Well-Founded Fear of Persecution Entitling Alien to Status of Refugee Under §101(a)(42)(A) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. § 1101(a)(42)(A))-Alleged Persecution in African and Oceanian Nations. **177 ALR Fed**  
Validity, Construction, and Application of Title I of the Economic Espionage Act of 1996 (18 U.S.C.A. §§ 1831 et seq.). **177 ALR Fed**

#### **CIVIL RIGHTS**

Award of Damages Under Family and Medical Leave Act (29 U.S.C.A. §§ 2601 et seq.). **176 ALR Fed 591**  
"Bona Fide Seniority System" Exception to General Prohibition of Age Discrimination in Employment (29 U.S.C.A. § 623(f)(2)(A)). **177 ALR Fed**

#### **ENVIRONMENTAL LAW**

Designation of "Critical Habitat" Under Endangered Species Act. **176 ALR Fed 405**

#### **EVIDENCE**

Admissibility of expert or opinion evidence—Supreme Court cases. **177 ALR Fed**

#### **FUGITIVES**

Application of "Fugitive Disentitlement Doctrine" in Federal Civil Actions. **176 ALR Fed 333**

#### **HABEAS CORPUS**

Modern Status of "In Custody" and Live-Controversy Requirements for Asserting Federal Habeas Corpus Challenge to Custody Pursuant to State Court Judgment. **176 ALR Fed 189**

#### **MONOPOLIES AND RESTRAINTS OF TRADE**

Validity, Construction and Application of the Anticybersquatting Consumer Protection Act, 15 U.S.C.A. § 1125(d). **177 ALR Fed**

#### **NATIONAL PARKS**

Liability of United States under Federal Tort Claims Act (28 U.S.C.A. §§1346(b), 2671-2780) for Death or Injury Sustained by Visitor to Area Administered by National Park Service. **177 ALR Fed**

#### **PENSIONS AND RETIREMENT FUNDS**

"Bona Fide Employee Benefit Plan" Exception to General Prohibition of Age Discrimination in Employment (29 U.S.C.A. § 623(f)(2)(B)) as Applied To Early Retirement Incentive Plans. **176 ALR Fed 115**

Preemption of State-Law Wrongful Discharge Claim, Not Arising From Whistleblowing, by § 541(a) of Employee Retirement Income Security Act of 1974 (29 U.S.C.A. § 1144(a)). **176 ALR Fed 433**

#### **PREEMPTION**

Preemption of State-Law Wrongful Discharge Claim, Not Arising From Whistleblowing, by § 541(a) of Employee Retirement Income Security Act of 1974 (29 U.S.C.A. § 1144(a)). **176 ALR Fed 433**

#### **TAXATION**

Taxpayer's Assertion of Equitable Estoppel Against the IRS Based on Representations of IRS or Non-IRS Employees. **176 ALR Fed 33**

#### **TERRORISM**

State-Sponsored Terrorism Exception to Immunity of Foreign States and Their Property Under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. § 1605(a)(7). **176 ALR Fed 1**

#### **TRADEMARKS AND TRADE NAMES**

Validity, Construction and Application of the Anticybersquatting Consumer Protection Act, 15 U.S.C.A. § 1125(d). **177 ALR Fed**

Also included with this volume is the December 2001 through March 2002 Update to the ALR Federal Quick Index.  
This pamphlet should be placed next to the bound volume.

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