

ALR Federal *Alert*

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From the editor

ALR Federal continues to cover a wide range of topics that are current or have continued relevancy to legal practitioners. Volume 181 contains annotations discussing attorney's fees (attorney's fees agreements in the bankruptcy context, and awards of attorney's fees to individuals who were the subject of investigations by independent counsel), evidentiary issues (evidentiary privilege under 23 U.S.C.A. § 409, and exclusion of witnesses under Federal Rule of Evidence 615), criminal law (Federal Sentencing Guideline 3B1.4, and the statutory minimization requirement for wiretapping and electronic surveillance), the Religious Land Use and Institutionalized Persons Act of 2000, and continued annotation coverage of ERISA. Scheduled for the upcoming volume 182 are annotations that relate to refugee status for aliens, constructive discharge under the Americans With Disabilities Act, and as pertinent to the current heightened concern with terrorism, an annotation discussing awards of damages under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act.

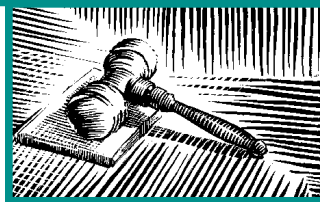
Joel E. Smith, J.D.

Highlights

ATTORNEY'S FEES

Fees Under 28 U.S.C.A. § 593(f)(1) to Individual Investigated by Independent Counsel

To obtain reimbursement of attorney's fees incurred in connection with an investigation by independent counsel, 28 U.S.C.A. § 593(f)(1) requires that a petitioner establish that he or she was the subject of the investigation, that no indictment was brought against him or her pursuant to the investigation, that the attorney's fees were incurred during the investigation, that the attorney's fees would not have been incurred but for the investigation, and that the amount of the attorney's fees was reasonable. In evaluating a request for reimbursement, 28 U.S.C.A. § 593(f)(2) requires the consideration of the sufficiency of documentation, the need or justification for the



attorney's fees, whether the attorney's fees would have been incurred but for the investigation, and the reasonableness of the amount requested. This annotation collects and analyzes all federal cases that address the award of attorney's fees under 28 U.S.C.A. § 593(f) to an individual who

was the subject of an investigation by independent counsel. [181 ALR Fed 49](#)

BANKRUPTCY

General or Classic Retainer Fee or Salary Contract in Bankruptcy Context

In order for an attorney's general or classic retainer fee or salary contract to be interpreted as enforceable, an attorney will generally need to show that the client

received value equivalent to the retainer fee at the time it was paid, so that the general or classic retainer fee was earned on receipt and nonrefundable. If this contemporaneous value is not demonstrated, it is likely that the contract will be interpreted as unenforceable or as involving another kind of retainer agreement besides a general or classic retainer, even if the contract explicitly states that is a general or classic retainer fee contract. Because the courts generally are deemed to have supervisory power to regulate attorney's fees contracts to ensure fees charged clients by attorneys are reasonable, courts will look to the form and not the substance of the contract in analyzing whether a retainer fee is a general or classic retainer fee. If the contract is not found to be an enforceable general or classic retainer fee contract, the attorney will generally be held to be entitled to receive or keep only the quantum meruit value of his or her services actually performed, rather than being able to keep or receive the full amount of the retainer specified in the contract. A general or classic retainer fee agreement is distinguished from other types of retainer fee agreements in that it involves a specified fee being paid in exchange for the attorney's commitment to handle all or some of a client's legal matters that arise over a defined period of time. The "value" received by the client in exchange for such a retainer fee is generally deemed to consist of the attorney's commitment to be available to handle the client's matters during the term of the agreement and/or the attorney's consequent inability to handle matters for other clients or potential clients during that period, most especially the attorney's inability to be retained by the adverse party. This annotation collects and discusses bankruptcy cases dealing with the construction and operation of an attorney's general or classic retainer fee or salary. [181 ALR Fed 1](#)

Employee Retirement Income Security Act (ERISA)

Insurer as Fiduciary Under ERISA

Although insurance companies owe a duty of good faith and fair dealing in carrying out their contractual commitments under an insurance policy,

and thus have an obligation to process claims fairly and to pay valid claims, they have not traditionally stood in a fiduciary relationship with claimants and beneficiaries, and therefore do not owe a duty to perform the claims function for the exclusive purpose of providing benefits. Under § 3(21)(A) of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C.A. § 1002(21)(A)), which makes a person a fiduciary of an ERISA plan to the extent that the person exercises authority, control, or responsibility with respect to the plan or its assets, an insurance company may become a fiduciary in a number of ways, based on a number of different, plan-related activities. This annotation examines those activities in which insurance companies engage with an eye to determining whether the insurer was a fiduciary under ERISA. In fact, the article outline is based on the activities of the insurer. Check the "Related annotations" section of the annotation for additional articles covering other aspects of ERISA. A reference to an article at 1 Am Jur Proof of Facts 3d 453 dealing with an employers unlawful interference with rights protected under ERISA can be found in the research references, along with other research and practice aids. [181 ALR Fed 269](#)

EVIDENCE

Exclusion of Witnesses Under Federal Rule of Evidence 615

Rule 615 of the Federal Rules of Evidence requires, subject to certain exceptions, a trial court to exclude witnesses so that they cannot hear the testimony of other witnesses on the request of a party. The purpose of Rule 615 is to discourage and expose fabrication, inaccuracy, and collusion and to minimize the opportunity that each witness will have to tailor testimony to the testimony of other witnesses. This annotation collects and analyzes the federal cases that have construed or applied Rule 615. [181 ALR Fed 549](#)

Coming Soon

ALIENS

Refugee Status—Evidence of Alien's Well-Founded Fear of Persecution

One method of establishing refugee status under § 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 that 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) concerning alleged persecution in European and Asian nations. [182 ALR Fed](#)

AMERICANS WITH DISABILITIES ACT

Constructive Discharge

To prevail in an action for employment discrimination under the Americans with Disabilities Act (42 U.S.C.A. §§ 12101 et seq.), colloquially known as the ADA, a plaintiff must establish, as part of a prima facie case, that he or she was discharged or suffered some other adverse employment action. When the plaintiff in an action alleging a violation of the ADA voluntarily resigned or terminated his or her employment, the critical discharge element may be proved on a theory of constructive discharge. Constructive discharge requires proof that the employee's working conditions were so intolerable that a reasonable person in the employee's position would have felt compelled to quit. Cases which have discussed whether an employee was constructively discharged in an action under the ADA are presented in this annotation, which includes not only a general discussion of the intensity of, and motivation underlying the adverse conditions, but also a case-by-case study of the particular nature of specific circumstances and conditions which the courts have addressed as constituting constructive discharge of a person protected by the ADA. **182 ALR Fed**

FOREIGN SOVEREIGN IMMUNITIES ACT

Damages for acts of state-sponsored terrorism

Although the Foreign Sovereign Immunities Act (FSIA) sets forth the general rule that foreign states are immune from the jurisdiction of both federal and state courts in the United States, it provides an exception with respect to certain suits in which money damages are sought by or on behalf of a U.S. national for certain acts of state-sponsored terrorism (28 U.S.C.A. § 1605 (a)(7)), and currently provides that such damages may include punitive damages

against an agent of instrumentality of such foreign state but not the foreign state itself (28 U.S.C.A. § 1606). This annotation collects and analyzes the cases that have discussed awards of damages under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act (28 U.S.C.A. § 1605 (a)(7)). **182 ALR Fed**

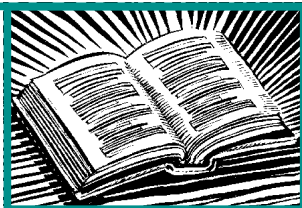
SEARCH AND SEIZURE

Warrantless Administrative Inspection of Businesses

The United States Supreme Court has held that the prohibition against unreasonable searches contained in the , applies to administrative inspections of private commercial property. However, there is greater latitude to conduct warrantless inspections of commercial property since the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections. In a closely or pervasively regulated industry, where the privacy interests of the owner are weakened and government interests in regulating the particular business are concomitantly heightened, a warrantless inspection of commercial premises may be reasonable where there is a substantial government interest informing the regulatory scheme pursuant to which the inspection is made, the warrantless inspection is necessary to further the regulatory scheme, and the inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant. The federal cases decided since *Colonnade* which have addressed the validity of a warrantless administrative inspection of a business that is allegedly closely or pervasively regulated are collected and discussed in this annotation. **182 ALR Fed**

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The following is a complete list, arranged alphabetically by topic, of annotations contained in the current Volume 181 or scheduled for publication in Volume 182 of ALR Federal. Some of the annotations listed may be rescheduled.



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ATTORNEY'S FEES

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