

ALR Federal

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From the editor

Federal criminal fraud statutes continue to be the subject of litigation, and this volume of ALR Federal contains an annotation examining the validity, construction and application of 18 U.S.C.A. § 1346, which provides that, for purposes of some federal criminal statutes, the term “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services. Similarly, volume 173 of ALR Federal will contain an annotation addressing what constitutes a violation of § 134 of the Consumer Credit Protection Act (15 U.S.C.A. § 1644), which prohibits the fraudulent use of a credit card. In addition, continuing from volume 171, volume 173 of ALR Federal will contain annotations concerning the Federal Tort Claims Act (28 U.S.C.A. §§ 1346(b), 2671-2680). Volume 173 of ALR Federal will address the liability of the United States, under the Federal Tort Claims Act, for damages caused by ingestion or administration of government-approved drugs, vaccines, and medications and the construction and application of an exception in the Federal Tort Claims Act (FTCA), 28 U.S.C.A. § 2680(c), concerning claims arising in respect of assessment or collection of any tax or customs duty, or detention of goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

Barbara J. Van Arsdale, J.D.

Highlights

CIVIL RIGHTS

Equal Protection and Due Process Clause Challenges Based on Racial Discrimination—Supreme Court Cases

The Fourteenth Amendment to the United States Constitution prohibits the states from denying to any person equal protection of the laws and prohibits the states from depriving any person of life, liberty, or property, without due process of law, while the Fifth Amendment provides that no person shall be deprived of life, liberty, or property, without due process of law. The Supreme Court of the United States has stated explicitly that its approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims brought under the Fourteenth Amendment.



These constitutional amendments have been interpreted by the Supreme Court as prohibiting many forms of discrimination on the basis of race on equal protection grounds. This annotation collects and analyzes Supreme Court decisions that have addressed Equal Protection and Due

Process Clause challenges based on racial discrimination. [172 ALR Fed 1](#)

CONSTITUTIONAL LAW

Excessive Fines Clause of Eighth Amendment—Supreme Court Cases

At the time of its ratification, the original Constitution was criticized in the Massachusetts and Virginia Conventions for its failure to provide any protection

for persons convicted of crimes, and this criticism provided the impetus in 1789 for the First Congress' inclusion of the Eighth Amendment, U.S.C.A. Const. Amend. 8, in the Bill of Rights. The primary focus of the Eighth Amendment was the potential for governmental abuse of its prosecutorial power. Congress did not discuss what was meant by the term "fines," or whether the prohibition had any application in the civil context. At the time of the drafting and ratification of the Eighth Amendment, the word "fine" was understood to mean a payment to a sovereign as punishment for some offense. Then, as now, fines were assessed in criminal, rather than in private civil actions. This annotation collects and analyzes the United States Supreme Court decisions that have examined the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. [172 ALR Fed 389](#)

CRIMINAL LAW

Scheme or Artifice to Deprive Another of Intangible Right of Honest Services

Section 1346 of the federal criminal code (18 U.S.C.A. § 1346) provides that for purposes of Chapter 63 of the federal criminal code (18 U.S.C.A. §§ 1341 et seq.), prohibiting mail, wire, bank, and health care fraud, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services. Some courts have held that manipulation of government contracts by public employees constitutes a scheme to deprive an employer of its right to honest services. This annotation collects and analyzes those cases which have construed,

applied, or determined the validity of 18 U.S.C.A. § 1346, defining the term "scheme or artifice to defraud" to include a scheme or artifice to deprive another of the intangible right of honest services. Check the Related Annotations section of the annotation for references to additional articles dealing with bank, wire and mail fraud. [172 ALR Fed 109](#)

LABOR AND EMPLOYMENT

Employment Discrimination—Replacement by Non-Protected Individual

Is an African American male who loses his job and is replaced by a Hispanic female precluded from recovery under federal civil rights statutes because he cannot establish that he was replaced by a non-protected individual? As will be discussed in this annotation, one of the elements required to establish a prima facie case under several statutes designed to prohibit discrimination in employment may or may not be a requirement that a plaintiff be replaced by an individual who is not a member of the class of persons protected from discrimination. The statutes protecting employment rights that are examined in this annotation are 42 U.S.C.A. § 1981, the Americans with Disabilities Act, and Title VII of the Civil Rights Act. Within broad divisions based on these statutes, the article contains sections based on the reason the purported victim left employment. Check the annotation summary for a concise, easy-to-read overview of this interesting topic. A list of annotations dealing with other aspects of these federal statutes can be found in the "Related Annotations" section of the annotation. [172 ALR Fed 465](#)

Coming Soon

CREDIT PROTECTION

Fraudulent Use of Credit Card

In recent years, with the use of credit cards throughout the United States reaching enormous proportions, it has been estimated that nearly \$1 billion in fraudulent credit card charges are made each year. Congress, cognizant of credit card fraud throughout the United States and foreign countries, sought to provide a remedy by enacting 15 U.S.C.A. § 1644, which broadly proscribes fraudulent use of credit cards in interstate or foreign commerce, or transactions affecting such commerce. Counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit cards are dealt with by the statute in defining various offenses, the prescribed punishment for which is a fine, imprisonment, or both. A common element in several of



the offenses is the requirement that the money, goods, services, or other thing of value involved must have an aggregate value of \$1,000 or more within any one-year period. Other offenses, such as those involving unlawful intent, transporting, or attempting to transport such credit cards, or using any instrumentality of interstate or foreign commerce to sell or transport them, have no valuation requirement. This annotation collects and summarizes those cases in which the courts have determined what constitutes a violation of § 134 of the Consumer Credit Protection Act (15 U.S.C.A. § 1644), which prohibits the fraudulent use of credit cards. For more information on credit card fraud, check the Practice Aids for a useful article on liability for unauthorized use of a credit card ([26 Am Jur POF 497](#)). [173 ALR Fed](#)

TORTS

Liability of United States for Damages Caused by Government—Approved Drugs

Because the United States government has taken an active role in approving and authorizing medications and vaccinations against disease, it has been called on to answer for damages caused thereby. The government's liability in tort is possible because of the Federal Tort Claims Act, which waives the United States' sovereign immunity for the tortious or negligent acts of its employees. The largest number of lawsuits against the government for post-vaccination injuries were brought following the National Swine Flu Immunization Program of 1976, when plaintiffs flocked to the courts seeking redress for injuries potentially caused by the vaccinations. The waiver of tort liability provided by the Federal Tort Claims Act is not absolute, however. The waiver does not apply to "discretionary functions" which involve matters of choice based on considerations of public policy. This annotation reviews and discusses federal cases concerning the government's liability under the Federal Tort Claims Act for damages caused by ingestion or administration of drugs, vaccines, and medications that were approved as safe for use by government agencies, both generally and in cases involving the application of the discretionary function exemption. **173 ALR Fed**

SENTENCING

Downward Departure for Community Service

Should an already rich individual who tried to increase his wealth by embezzling from his employer be able to obtain a reduction of sentence by donating some of his money to a charitable organization? What if he offered to donate his time by working in a soup kitchen? This annotation will examine those cases in which the courts determined the propriety of a downward departure from the United States Sentencing Guidelines based on community service. As discussed in the annotation summary, the United States Supreme Court stated in *Koon v. U.S.*, 518 U.S. 81, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996), that, for purposes of determining whether a special factor present

in a case warrants downward departure under the Sentencing Guidelines, if such factor is "discouraged" under the Guidelines, a court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from an ordinary case where such factor is present. Since policy statement §5H1.11 provides that civic, charitable, or public service and similar prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range, *Koon* has set the standard that is applied in the cases in this annotation. Although a few courts appear to have taken the position that community service cannot be the basis of a downward departure, most look to the facts of the particular case. **173 ALR Fed**

NATIVE AMERICANS

Native American Graves Protection and Repatriation Act

The Native American population's cultural remains, unlike that of any other population, uniquely suffered from being the object of a very significant market for thieves and vandals, and of unparalleled interest by museums and collectors. Before the passage of the Native American Graves Protection and Repatriation Act (NAGPRA), for example, the Smithsonian Institute alone had approximately 18,500 Native American skeletons in its collection, the Tennessee Valley Authority possessed approximately 10,000 Native American skeletons, and estimates of the number of Native American skeletons in museums and private collections ranged from 100,000 up to two million. In addition, the methods for obtaining Indian corpses and funerary items for these collections were sometimes gruesome and shocking. Accordingly, Congress concluded that although state and local laws against abusing corpses, vandalism, and grave-robbing were adequate to protect most modern cemeteries, but that special measures were required to address the unique problem of the theft and desecration of Native American cultural objects and remains and enacted the NAGPRA (25 U.S.C.A. §§3001 et seq.) on November 16, 1990. This annotation collects and analyzes federal cases discussing and construing NAGPRA as applied in both civil and criminal actions. **173 ALR Fed**

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The following is a complete list, arranged alphabetically by topic, of annotations contained in the current Volume 172 or scheduled for publication in Volume 173 of ALR Federal. Some of the annotations listed may be rescheduled. Advance copies of coming annotations may be obtained by customers free of charge by calling 1-800-225-7488 or by sending an e-mail to alr@westgroup.com.



AMERICANS WITH DISABILITIES ACT

Actions Brought Under Americans with Disabilities Act, 42 U.S.C.A. §§ 12101 et seq.—Supreme Court Cases. **173 ALR Fed**

ANTITRUST

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NATIVE AMERICANS

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PRE-EMPTION

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Construction and Application of Federal Tort Claims Act (FTCA) Exception in 28 U.S.C.A. § 2680(c), Concerning Claims Arising in Respect of Assessment or Collection of Any Tax or Customs Duty, or Detention of Goods or Merchandise By Any Officer of Customs or Excise or Any Other Law-Enforcement Officer. **173 ALR Fed**

Liability of United States, under Federal Tort Claims Act (28 U.S.C.A. §§1346, 2680), for Damages Caused by Ingestion or Administration of Government-Approved Drugs, Vaccines, and Medications. **173 ALR Fed**

Also included with this volume is the August 2001 Update to the ALR Federal Quick Index.
This pamphlet should be placed next to the bound volume.
The June 2001 Pamphlet should be recycled or discarded.

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