

ALR Federal

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From the editor

When the economists begin predicting that the economy is in a recession and the Chairman of the Federal Reserve Board lowers interest rates for the third time in a year, some individuals and corporations begin to look at bankruptcy law as one possible solution to their economic woes. Both ALR Federal volumes 174 and 175 address aspects of the Bankruptcy Code. The bankruptcy annotation in volume 174 discusses whether retirement fund benefits or refunds of retirement fund contributions can be considered “property” of bankruptcy estate under § 541 of the Bankruptcy Code. Volume 175 will contain a special commentary dealing with the construction and application of the absolute priority plan under Chapter 11 of the Code.

Amy P. Bunk, J.D.

Highlights

EVIDENCE

Witness Unavailability Pursuant to FRE 801

Rule 802 of the Federal Rules of Evidence codifies the hearsay rule, providing that hearsay is not admissible except as provided by the Federal Rules of Evidence or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress. Rule 804 of the Federal Rules of Evidence provides an exception to the hearsay rule for certain statements by declarants who are unavailable to testify at trial or a hearing. “Unavailability of a witness” is defined under Rule 804(a). This annotation collects and analyzes the federal cases which have discussed whether, with respect to determining the admissibility of a witness’ out-of-court statement under an exception to the hearsay rule, a witness is “unavailable” as that term is defined under Rule 804(a) of the Federal Rules of Evidence. [174 ALR Fed 1](#)



COPYRIGHT AND INTELLECTUAL PROPERTY

Right to an Award of Attorney’s Fees

When a creative mind comes up with a truly new and valuable intellectual property, a modern society recognizes the right of that creative mind to share in the benefit from that property. The vehicle for assuring the benefit to the creator is the copyright, some form of which is provided by virtually all civilized countries. In the United States, a copyright is protected by providing a civil cause of action for copyright infringement. Among the amounts recoverable in such an action is the plaintiff’s reasonable attorney’s fees, an additional benefit not available under the American Common Law for civil actions, but expressly provided for by statute (17 U.S.C.A. § 505), that states that the court, in its discretion, “may” allow such fees to the prevailing party in a copyright infringement action. While some courts for a time allowed attorney’s fees to a

prevailing defendant as a matter of course, the practice today is to treat the parties evenhandedly, and allow fees only where there have been certain aggravating factors displayed on the part of the losing party that justify the fee award. This annotation draws out the reasoning of the courts with regard not only to the meaning of the term “prevailing party” in such an action, but also lists and analyzes the particular factors to be considered, and examines whether the controlling judicial discretion was or was not abused in particular decisions. [174 ALR Fed 289](#)

CIVIL RIGHTS

Equal Access Act

The Equal Access Act (20 U.S.C.A. §§ 4071-4074) requires public secondary schools that receive federal financial assistance and have limited open fora to provide access, or a fair opportunity for access, to student groups wishing to meet on school premises, regardless of the religious, political, philosophical, or other content of their speech. Schools provide a fair opportunity for access if: (1) they uniformly provide access for student meetings that are voluntary and student initiated; (2) the school does not sponsor the meetings; (3) school officials do not participate in the meetings; (4) the meetings do not substantially and materially interfere with educational activities; and (5) nonschool persons do not direct or control the meetings. The Equal Access Act has been used by both religious and nonreligious student

groups to gain access to public school fora. This annotation collects and analyzes the cases in which the federal courts have construed or applied the Equal Access Act. [174 ALR Fed 407](#)

BANKRUPTCY

Retirement Funds

Commencement of a bankruptcy case under the Bankruptcy Reform Act of 1978 (Bankruptcy Code), Pub. L. No. 95-598, 92 Stat. 2549 (1978), codified at 11 U.S.C.A. §§101-1330, creates a debtor estate and defines the parameters of debtor and creditor rights. The Bankruptcy Code, 11 U.S.C.A. § 541(a), enumerates what property must be included in the bankruptcy estate, and requires inclusion of almost every property interest held by the debtor before bankruptcy, both intangible and tangible assets in the debtor estate. Additionally, the Bankruptcy Code delineates what property interests may be exempted or excluded from a debtor’s estate. Specifically, 11 U.S.C.A. § 541(c)(2) allows a debtor’s property interest to be excluded from the bankruptcy estate if the interest is nontransferable under “applicable nonbankruptcy law.” A number of federal courts have addressed the issue of whether retirement fund benefits or refunds of retirement fund contributions constitute “property” of a bankruptcy estate under the Bankruptcy Code, 11 U.S.C.A. § 541. This annotation collects decisions that have addressed retirement fund benefits or refunds of retirement fund contributions as “property” of a bankruptcy estate under the Bankruptcy Code, 11 U.S.C.A. § 541. [174 ALR Fed 587](#)

Coming Soon

IMMIGRATION

Citizenship of Child

United States citizenship is acquired under the United States Constitution or by federal statute. Persons born in the United States automatically become citizens under the Fourteenth Amendment. Alternatively, a person may have a statutory right to United States derivative citizenship through certain familial relationships. The applicable statute has been revised over the years. Presently, derivative citizenship is granted to all foreign-born children of either American citizen parent under the Immigration and Nationality Act, 8 U.S.C.A. § 1401(c)-(g). The applicable law for transmitting citizenship to a child born abroad when one parent is a United States citizen is the statute that was in effect at the time of the child’s birth. In October, 1994, Congress enacted legislation that amended 8 U.S.C.A. § 1401 to eliminate retroactively the gen-



der distinction contained in the original version of the relevant statute, § 1993 of the Revised Statutes. Federal courts, as well as representative administrative decisions of the Board of Immigration Appeals and the Immigration and Naturalization Service, have addressed the validity, construction, and application of 8 U.S.C.A. § 1401(c)-(g), providing for American citizenship in certain circumstances of a child born outside the United States or found within the United States and of unknown parentage, and predecessor statutes. Federal court cases, as well as selected Board of Immigration Appeals decisions, that have addressed the validity, construction, and application of 8 U.S.C.A. § 1401(c)-(g), providing for American citizenship in certain circumstances of a child born outside the United States or found within the United States and of unknown parentage, and predecessor statutes, are collected in the following annotation. [175 ALR Fed](#)

BANKRUPTCY

Absolute Priority Rule

The objective of any debtor in commencing a case under Chapter 11 of the Bankruptcy Code is the presentation of a plan of reorganization and repayment of creditors that meets the statutory requirements for entry of an order of confirmation by the Bankruptcy Judge. Confirmation of a plan of reorganization under Chapter 11 occurs in some 7% of the cases commenced by petition under that Chapter across the nation. One reason so few survive the plan process is the absolute priority rule and the related new value doctrine. The phrase “absolute priority rule” cannot be found in the Bankruptcy Code or Rules, yet it has been one of the requirements for judicial approval of a plan in reorganization cases since its first enunciation by the Supreme Court in 1913. The embodiment of the concept of the absolute priority rule has been judicially interpreted to be included in § 1129(b)(2) of the Code (11 U.S.C.A. § 1129(b)) by reference through the statutory requirements that a contested plan be found to be “fair and equitable” to all classes of claimants or interest holders who reject a reorganization plan. These simple words have led to increasing divergence of judicial interpretation and application of the rule, including conflicting interpretations even on the continued applicability of certain aspects of the rule under the present Bankruptcy Code. This annotation collects and analyzes cases concerning the application of the “absolute priority rule” to the process by which a plan of reorganization is presented for judicial review and confirmation under Chapter 11 of the Bankruptcy Code, and the “new value” exception or corollary to the rule by which a plan proponent may meet an objection to confirmation of the Chapter 11 plan based on an alleged failure to comply with the requirements of the absolute priority rule. **175 ALR Fed**

LABOR AND EMPLOYMENT

USERRA

In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act

(USERRA), 38 U.S.C.A. §§ 4301-4333, to replace the Veterans' Reemployment Rights Act (VRRRA), formerly codified at 38 U.S.C.A. §§ 4301-4307, in order to clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions. USERRA was designed to continue to prohibit discrimination or acts of reprisal against an employee because of a past, current, or future military obligation, but eliminated the “because of” language, and Congress disavowed the sole-motivation requirement implied by an earlier United States Supreme Court decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 101 S. Ct. 2510, 69 L. Ed. 2d 226, 107 L.R.R.M. (BNA) 2633, 91 Lab. Cas. (CCH) P 12796 (1981). The VRRRA's language was modified to state that an employer violates USERRA if an employee's membership or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership or obligation. Decisions which have construed and applied the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C.A. §§ 4301-4333, are collected in the following annotation. **175 ALR Fed**

STATUTES

Assimilation of DUI Statutes

The Assimilative Crimes Act (“ACA”) (18 U.S.C.A. § 13) provides that when a person commits an act on a federal enclave, that is not a violation of federal law, but it is a violation of the laws of the state where the enclave is located, the person may be prosecuted in federal court, and shall be subject to a punishment like that provided for by state law. The ACA has often been used to assimilate state laws that prohibit driving under the influence of alcohol, and courts have had to resolve a variety of issues regarding the assimilation of such laws. This annotation collects and analyzes cases in which federal courts decided issues regarding the assimilation, under the ACA, of state laws prohibiting driving under the influence of alcohol. **175 ALR Fed**

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The following is a complete list, arranged alphabetically by topic, of annotations contained in the current Volume 174 or scheduled for publication in Volume 175 of ALR Federal. Some of the annotations listed may be rescheduled.



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Measure and Amounts of Attorney's Fee Awards Under § 615(i)(3) of Individuals with

Disabilities Education Act (20 U.S.C.A. 1415(i)(3)). **174 ALR Fed 453**

BANKRUPTCY

Retirement Fund Benefits or Refunds of Retirement Fund Contributions as “Property” of Bankruptcy Estate Under § 541 of Bankruptcy Code of 1978 (11 U.S.C.A. § 541). **174 ALR Fed 587**

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

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