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- **Summary and Comment.** A concise general overview of the topic, necessary background information, and cross-references to more detailed discussions within the body of the annotation.
- **Practice Pointers.** Practical information related to the topic, offering guidance on what to do and how to do it in the course of representing a client, tips on procedure, and potential pitfalls.
- **Scope Statement.** A concise statement of the subject matter included in the annotation, any exclusions, and any supersessions of earlier annotations.

- **Reported Case.** For each annotation, a full court opinion, including headnotes classified to the West Key Number System, illustrating the topic and providing a context for the discussion is published in the Reported Cases part of each bound volume.
- **Jurisdictional Table of Cases, Laws and Rules.** A list of cases and statutes from each jurisdiction, with section references listing where they are discussed within the annotation.
- **Schematic Article Outline.** This article-level table of contents indicates where a particular legal concept or fact situation is treated.
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- **Annual cumulative supplement.** Annual supplements, inserted into the back of each volume, contain:
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- **Latest Case Service Hotline.** E-mail west.ALRLCS-Rochester@thomson.com, or call, toll-free, **1-800-328-4880** to obtain cites of the relevant cases decided since the last print supplement was issued.

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You may choose to begin your research in West's ALR Digest to locate relevant key numbers and refer to the annotations and reported cases listed for each key number. To navigate to the Digest, type "ALR" into the WestlawNext® search box and choose "American Law Reports Digest" from the dropdown list.

You may view ALR results from any WestlawNext® search by filtering your results: choose "Secondary Sources" in the left View pane of the Search Results screen then scroll down to Publication Type and choose ALR.

For each of these search locations, you can search using either a Terms and Connectors search or a Natural Language search. To narrow your results, you may find it helpful to use a title restriction in your search, which will look for the search terms only in the titles of the annotations.

To find an annotation on point for your issue or topic, you may also begin by searching the ALR database, using either a Natural Language or Terms and Connectors search. To narrow your results, you may find it helpful to use a title restriction in your Terms and Connectors search, which will look for your search terms only in the titles of annotations.

For example, if you need to find an annotation discussing whether the death penalty as applied to mentally retarded persons is permissible, or whether it constitutes cruel and unusual punishment under the Eighth Amendment, you might try one of the following searches on WestlawNext®:

"death penalty" execution capital /p retarded mental! & "cruel and unusual"

(brings up any annotation that has the phrase "death penalty" or the words "execution" or "capital" *in the same paragraph* as the word "retarded," some form of the word "mental," *or* the phrase "cruel and unusual")

TI(death execution capital & retarded mental!)

(brings up only those annotations that contain the words "death," "execution," or "capital" *and* the word "retarded" or some form of the word "mental" *in the title*)

Suppose you know that a particular case, *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), has impacted this issue. You might try searching for the case by name in the format illustrated below:

Atkins /3 Virginia

(looks for the word "Atkins" within 3 words of the word "Virginia" *anywhere in an annotation*)

Although the results would be more limited, a combination of the above search techniques might also be useful, such as:

TI(death execution capital) & Atkins /3 Virginia

(looks for the words “death,” “execution,” or “capital” *in the title of an annotation* that also contains the word “Atkins” within 3 words of the word “Virginia” *anywhere in that an annotation*)

Any of the above searches would reveal three annotations directly on point for the issue of the death penalty as applied to mentally ill or retarded persons:

- Application of Constitutional Rule of Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), that Execution of Mentally Retarded Persons Constitutes “Cruel and Unusual Punishment” in Violation of Eighth Amendment, 122 A.L.R.5th 145
- Propriety of Carrying Out Death Sentences Against Mentally Ill Individuals, 111 A.L.R.5th 491
- Propriety of imposing capital punishment on mentally retarded individuals, 20 A.L.R.5th 177

If you know of a case that discusses your issue and wish to find out if the case has been discussed in an annotation, you may use the KeyCite feature or Citing References tab to check for any annotations that have cited that particular case. In addition, you may use KeyCite or the Citing References tab to check for later history concerning any annotation—to find out if the annotation has been superceded in whole or part, or whether the annotation has been cited in case opinions.

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

Finding additional information on your topic

Once you find a relevant annotation for your issue or topic, WestlawNext® offers other tools to help you with your research. You may use links from the Research References portion of the annotation to take you to related material in analytical or forms products, you may use the suggested WestlawNext® query, or one of your own, to search related databases, or you may conduct a Key Number search using the Key Numbers identified as relevant to the annotation. The list of Related Annotations will point you to other helpful annotations, and the cited Law Review articles may provide additional insight on the topic. In addition, links from the reported case or a search of the appropriate databases will take you to pertinent briefs, pleadings, and motions. References to select websites may lead you to important information, such as changes in agency policies or new official forms available from government web pages.

If you have any further questions about ALR, please email us at west.ALRLCS-Rochester@thomson.com

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Application of Relation-Back Doctrine Permitting
Change in Party After Statute of Limitations Has
Run in State Court Action—Construction Cases

by
George L. Blum, J.D.

The “relation-back” doctrine enables a plaintiff to correct a pleading error, by adding either a new claim or new party, after the statutory limitations period has expired. If an amended complaint relates back to the date of the filing of the original complaint, the amended complaint is treated, for statute of limitations purposes, as if it had been filed at that time. Relation back provisions aim to relieve the harsh result of the strict application of the statute of limitations. The courts in a number of cases have analyzed the “relation-back” doctrine permitting a change in a party after the statute of limitations has run in a state court action arising out of a construction case, that is, involving disputes between the parties related to contractual obligations, the quality or conduct of the work, or the like, and related to personal injuries occurring on or due to the construction work being done. In *Maggi v. RAS Development, Inc.*, 2011 IL App (1st) 91955, 350 Ill. Dec. 939, 949 N.E.2d 731, 104 A.L.R.6th 579 (App. Ct. 1st Dist. 2011), as corrected, (July 19, 2011), for example, the court held that the failure of a deceased bricklayer’s estate to properly name a general contractor as a defendant in an initial construction negligence complaint was a case of mistaken identity for purposes of determining the application of the relation-back doctrine. This annotation collects and discusses all of the cases applying the “relation-back” doctrine permitting a change in a party after the statute of limitations has run in a state court action arising out of a construction case.

***Maggi v. RAS Development, Inc.* is fully reported at page 579, *infra*.**

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Research References

The following references may be of related or collateral interest to a user of this annotation.

WEST'S KEY NUMBER DIGEST

Limitation of Actions ⇨ 121(2), 124, 125, 127(1)

Products Liability: Clothes Washing Machines

by
Patricia E. Kelley, J.D

There has been a growing trend of class action litigation against the manufacturers and sellers of front-loading washing machines that were alleged to be defectively designed, including claims that the manufacturers knew of these defects when the machines were sold and failed to warn the consumers. Several of these cases have been certified, including *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838, *Prod. Liab. Rep. (CCH) ¶ 19191*, 86 Fed. R. Serv. 3d 242, 104 A.L.R.6th 611 (6th Cir. 2013), cert. denied, 134 S. Ct. 1277, 188 L. Ed. 2d 298 (2014), a case involving a class of Ohio consumers pursuant to Fed. R. Civ. P. 23(a), (b)(3), in a putative class action against the manufacturer of front-loading washing machines. This annotation collects and discusses state and federal cases in which courts have considered the liability of a manufacturer, distributor, or seller of laundry washing machines for personal injury, death, or property damage allegedly caused by a defective, faulty, or otherwise imperfect machine.

***In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation* is fully reported at page 611, *infra*.**

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WEST'S KEY NUMBER DIGEST

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Divorce and Separation: Custody Disputes
Concerning Pets

by
Jay M. Zitter, J.D.

A pet is often treated as a member of the family, with all members lavishing love and affection on their cat or dog. Unfortunately, when couple decides to end their relationship and cannot agree between themselves who should get the pet, the courts must get involved in order to resolve this dispute. The courts have wrestled with the point that while for most purposes, a dog or cat is in fact considered to be mere personal property whose ownership should be determined just like that of the couple's other assets, the issues of which spouse primarily took care of the pet or has better facilities to do so after the divorce would seem to require the court to undertake a "best interests" analysis similar to child custody. For example, in *Travis v. Murray*, 42 Misc. 3d 447, 977 N.Y.S.2d 621, 104 A.L.R.6th 641 (Sup 2013), a divorce proceeding, where the defendant partner assertedly wrongfully took the couple's dog at the time the couple separated, the court ruled that the decision as to which partner would have custody of the dog was to be made after a full hearing, with the standard to be applied being what was best for all concerned. Other courts have reached varying conclusions as to which spouse should be awarded custody of a pet, as the following annotation illustrates.

Travis v. Murray is fully reported at page 641, infra.

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Discoverability of Communications Between Insurer
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by
David J. Marchitelli, J.D.

The Federal Rules of Civil Procedure, and similar state rules, have been interpreted as requiring the production of reinsurance agreements in cases involving disputes over the coverage provided by underlying, reinsured policies. In addition, policyholders and other nonparties to reinsurance agreements have sought to discover other reinsurance information, including correspondence between insurers and reinsurers, while insurers and reinsurers have contended that the information is irrelevant to the issue of whether an insurance policy provided coverage. Furthermore, insurers and reinsurers have objected to the production of information that was argued to be confidential, proprietary, and privileged. In *Fireman's Fund Ins. Co. v. Great American Ins. Co. of New York*, 284 F.R.D. 132, 104 A.L.R.6th 657 (S.D. N.Y. 2012), the court took the position that insurer-reinsurer communications were relevant and discoverable where an insured claimed that a defendant-insurer acted in bad faith, the insurer raised an affirmative defense based on misrepresentation and nondisclosure, and the insurer filed a counterclaim alleging fraud on the part of the insured. Moreover, the court maintained that the insurer-reinsurer relationship is not inherently one of confidence and privilege, for purposes of protections afforded by the common interest doctrine, and held that the doctrine did not apply under the circumstances. This annotation collects and analyzes the cases in which courts have determined whether to allow discovery of reinsurance information by a nonparty to a reinsurance agreement.

Fireman's Fund Ins. Co. v. Great American Ins. Co. of New York is fully reported at page 657, *infra*.

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Construction and Application of Restatement
Second, Contracts § 261: Discharge by Supervening
Impracticability

by
Deborah F. Buckman, J.D.

Restatement Second, Contracts § 261 states the common law contract doctrine of impossibility of performance, now more broadly termed “discharge by supervening impracticability”: “Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.” This annotation will collect and discuss the large body of case law interpreting this rule and determining whether particular supervening events indeed created such impracticability that performance should be excused. In *Great Lakes Gas Transmission Ltd. Partnership v. Essar Steel Minnesota, LLC*, 871 F. Supp. 2d 843, 104 A.L.R.6th 675 (D. Minn. 2012), for example, the court held that a purchaser of natural gas was not excused from paying for the transportation of the gas by the doctrine of commercial impracticability based on its inability to obtain financing for a plant due to the global financial crisis.

Great Lakes Gas Transmission Ltd. Partnership v. Essar Steel Minnesota, LLC is fully reported at page 675, *infra*.

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Research References

The following references may be of related or collateral interest to a user of this annotation.

WEST'S KEY NUMBER DIGEST

Contracts ☞309(1); Gas ☞9

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- A.L.R. Index, Contracts; Impossibility; Sale and Transfer of Property; Specific Performance; Uniform Commercial Code
- West's A.L.R. Digest, Contracts ☞309(1); Gas ☞9
- Impracticability of performance of sales contract under UCC sec. 2-615, 55 A.L.R.5th 1
- Enforceability of voluntary promise of additional compensation because of unforeseen difficulties in performance of existing contract, 85 A.L.R.3d 259
- Modern status of the rules regarding impossibility of performance as defense in action for breach of contract, 84 A.L.R.2d 12
- Comment Note.—Right to recover consideration paid or performed upon contract, performance of which by other party is excused by reason of supervening impossibility, 144 A.L.R. 1317

LEGAL ENCYCLOPEDIAS

- Am. Jur. 2d, Contracts §§ 655, 656
- C.J.S., Contracts §§ 688 to 690

TREATISES AND PRACTICE AIDS

- Bruner & O'Connor on Construction Law §§ 4:30, 4:32, 14:44
- Haig, Business and Commercial Litigation in Federal Courts § 78:35 (3d ed.)
- Nash and Feldman, Government Contract Changes § 13:3 (3d ed.)
- Government Contract Guidebook § 13:6 (4th ed.)

Action for Damages for Attempted Wrongful
Foreclosure

by
Dale Joseph Gilsinger, J.D.

When a borrower asserts a claim for damages resulting from a foreclosing party's alleged wrongful conduct where the foreclosure process has not culminated in the sale of the borrower's property, such a presale claim is referred to as an action for "attempted" wrongful foreclosure. This action has been recognized in a minority of jurisdictions. In those jurisdictions, courts have examined whether a plaintiff borrower has alleged or proved facts legally sufficient to maintain or prevail upon such an action. For example, in *Fenello v. Bank of America, N.A.*, 926 F. Supp. 2d 1342, 104 A.L.R.6th 701 (N.D. Ga. 2013), *aff'd* on other grounds, 577 Fed. Appx. 899 (11th Cir. 2014) (applying Georgia law), it was held that the borrowers could not state an actionable claim for attempted wrongful foreclosure because they had failed to allege that statements published by the foreclosing party were untrue or derogatory. This annotation collects state and federal decisions in which the courts have considered or discussed an action for damages for attempted wrongful foreclosure.

Fenello v. Bank of America is fully reported at page 701, *infra*.

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Research References

The following references may be of related or collateral interest to a user of this annotation.

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Mortgages Ⓒ216, 650

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West's A.L.R. Digest, Mortgages Ⓒ650

Necessity of Production of Original Note Involved in Mortgage Foreclosure—Twenty-First Century Cases, 86 A.L.R.6th 411

Recognition of Action for Damages for Wrongful Foreclosure—Types of Actions, 82 A.L.R.6th 43

Recognition of Action for Damages for Wrongful Foreclosure—General Views, 81 A.L.R.6th 161

Propriety of setting minimum or “upset price” for sale of property at judicial foreclosure, 4 A.L.R.5th 693

Mortgage foreclosure forbearance statutes—modern status, 83 A.L.R.4th 243

Right of trustee of land having interest therein to purchase on his own behalf in association with foreclosure by third-party lienor, in absence of express trust provision, 30 A.L.R.4th 732

Failure to keep up insurance as justifying foreclosure under acceleration provision in mortgage or deed of trust, 69 A.L.R.3d 774

Mortgagor's interference with property subject to order of foreclosure and sale as contempt of court, 54 A.L.R.3d 1242

Right of junior mortgagee whose mortgage covers only a part of land subject to first mortgage to redeem pro tanto, where he was not bound by foreclosure sale, 46 A.L.R.3d 1362

Family allowance from decedent's estate as exempt from attachment, garnishment, execution, and foreclosure, 27 A.L.R.3d 863

Application of Equal Protection Principle
Recognized in *Bush v. Gore*, 531 U.S. 98, 121 S. Ct.
525, 148 L. Ed. 2d 388 (2000), to Elections Cases

by
Jay M. Zitter, J.D.

One of the most dramatic outcomes of a presidential campaign in American history involved the 2000 contest between George W. Bush and Al Gore, in which Florida's results, which were not finalized for over a month after Election Day, were decisive. Florida's Election Day results gave an extremely small margin to Bush, and this margin was even smaller after a recount. Legal challenges sought additional recounts. A Florida Supreme Court-ordered continuation of a partial recount in certain counties was overturned by the United States Supreme Court in *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000), in part because the varying standards between counties as to how to determine votes constituted an equal protection problem. While the Court specifically limited the precedential value of its holding, saying that "consideration is limited to the present circumstances," nevertheless, other courts have attempted to apply the *Bush v. Gore* Equal Protection standard to election controversies. For example, where a consent decree provided a remedy for a state statute's rejection of all wrong-precinct ballots only for voters who used the last four digits of their Social Security number for identification to cast their provisional ballots, but where a provisional voter using any other form of identification received no such reprieve, the court held in *Northeast Ohio Coalition for Homeless v. Husted*, 696 F.3d 580, 104 A.L.R.6th 717 (6th Cir. 2012), that the consent decree likely violated the Equal Protection principle recognized in *Bush v. Gore*. Other case law has reached varying conclusions in applying the *Bush v. Gore* Equal Protection standard as the following annotation illustrates.

Northeast Ohio Coalition for Homeless v. Husted is fully reported at page 717, *infra*.

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Research References

The following references may be of related or collateral interest to a user of this annotation.

WEST'S KEY NUMBER DIGEST

Constitutional Law ☞3068, 3284, 3365, 3648, 3652, 3653, 3654, 3655, 3657, 3658(3), 3661; Election Law ☞312, 332, 336, 362, 363(1), 393, 399, 408, 420, 429, 510, 552(3), 561(3), 595, 629, 653; Injunction ☞1344, 1346

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PRIMARY AUTHORITY

U.S. Const. Amends. I, XIV, XV, XIX

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A.L.R. Index, Ballots; Constitutional Law; Elections and Voting; Equal Protection; First Amendment; Political Activities

West's A.L.R. Digest, Injunction ☞1346

Challenges to Write-in Ballots and Certification of Write-in Candidates, 75 A.L.R.6th 311

Validity, Construction, and Application of 17th Amendment to United States Constitution, Providing for Direct Election of Senators and Filling Vacancies in State's Senatorial Delegation, 68 A.L.R.6th 489

Validity of Runoff Voting Election Methodology, 67 A.L.R.6th 609

Validity, Construction, and Application of State Requirements for Placement of Independent Candidates for United States Senate on Ballot, 59 A.L.R.6th 111

Validity of Statute Limiting Time Period for Voter Registration, 56