Chapter 21

Criminal Appeals

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Chapter 21

Criminal Appeals

Standard 21-1.2. Purposes of criminal appeals; appellate court structure

Page 21·9. To the end of note 3, add the following new material:

The American Bar Foundation sponsored a major study of criminal appeals in the mid-1970s in the California Court of Appeal for the First Appellate District. Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal,* 1982 A.B.F. RES. J. 543. The research team discovered that only a very small number of convictions had been upset on appeal and that this appellate court was governed by a very narrow and restrained view of its role in criminal justice proceedings.

> Numerous errors are recognized but discarded as harmless — so much so that certain recurring errors such as improper comments by prosecutors seem to be almost immune from correction. In addition, the rather skewed distribution of the errors recognized by the court suggests that many errors may be downplayed or ignored. Review of situations that have long been viewed as settings of police misconduct, like the "dropsy" search and seizure cases, is systematically avoided by invoking the substantial evidence rule. (*Id.* at 638 (footnotes omitted)).

The author of the report on the study concluded:

> If there is a crisis in intermediate appellate justice, it is not simply a matter of backlogs and delay; more fundamentally, it reflects an un-

> certainty of purpose. The frivolous appeal concept has too readily diverted attention from the more basic questions about the functions that *should* be served by intermediate appellate review. The case study presents a portrait of intermediate appellate justice in which a low reversal rate in criminal appeals exists simultaneously with a substantial number of recognized but uncorrected errors. That combination of features indicates a troubling institutional incapacity to reach and deal with breaches of legality. (*Id.* at 647-648 (footnote omitted)).

Within the federal system, the Supreme Court recently addressed the function of the intermediate courts of appeals in criminal cases. A court of appeals had reversed a conviction on the ground that the prosecutor's summation had violated the defendant's constitutional right not to testify. The Supreme Court, reversing the court of appeals, held that the error had been harmless. United States v. Hasting, — U.S. —, 103 S. Ct. 1974 (1983). The Court declared that a reviewing court must consider a trial record as a whole and ignore harmless errors, including most constitutional violations, and that the goal of appellate review is to cleanse the judicial process of prejudicial error without becoming mired in reversals for harmless error.

The Court of Appeals for the Ninth Circuit recently abandoned a familiar doctrine that affected review of convictions involving multiple offenses. If the sentences were fixed to run concurrently, many appellate courts decline to consider the merits of contentions that attacked only one count such that reversal would not affect the appellant's sentence. Overruling the so-called concurrent sentence doctrine, the Ninth Circuit, sitting *en banc,* declared that henceforth it will address the merits of all contentions before it on appeal. United States v. DeBright, 730 F.2d 1255 (9th Cir. 1984) (*en banc*).

For an analysis of the effect on the outcomes of subsequent criminal proceedings of appellate court decisions to reverse for procedural errors, *see* Roper & Melone, *Does Procedural Due Process Make a Difference?*, 65 JUDICATURE 136 (1981).

Page 21·10. Delete the last sentence of note 5 and replace it with the following new material:

Over 60 percent of the states now have intermediate appellate courts. Davis, *Affirmed: A Study of Criminal Appeals and Decision-Mak-*

ing Norms in a California Court of Appeal, 1982 A.B.F. RES. J. 543, 547 n.21.

Standard 21-1.3. Limitation on defendants' appeals; final judgments and interlocutory appeals

Page 21·12. On line 1 of note 1, after "See standard 18-2.3(b) (iv)," insert the following new reference:

See State v. Kottenbroch, 319 N.W.2d 465, 472 (N.D. 1982) (citing standards).

Page 21·13. To the end of note 3, add the following new references:

See also State v. Jenich, 94 Wis. 2d 74, 288 N.W.2d 114 (1980)(double jeopardy); *but see* United States v. Levine, 658 F.2d 113 (3d Cir. 1981).

Page 21·14. Replace note 4 with the following new note:

See People *ex rel.* Leonard v. Mosley, 74 Ill. 2d 527, 387 N.E.2d 325 (1979).

Page 21·15. At the end of the carryover paragraph, insert:

Since the last edition of these standards, a substantial body of case law developed involving interlocutory appeals from orders that defense counsel were disqualified. Although most federal courts of appeals allowed such appeals,[6a] the Supreme Court decided in *Flanagan v. United States*[6b] that no right to an interlocutory appeal exists under federal statutory law. The Supreme Court also held that a federal defendant is not entitled to an interlocutory appeal from denial of its motion contending that the prosecution had increased charges against it vindictively. In *United States v. Hollywood Motor Car Co.,*[6c] after defendant had obtained a change of venue, additional charges were filed by the prosecution, and defendant asserted that these charges were added to retaliate for defendant's success in pressing for a change of venue. Although the court of appeals al-

lowed the appeal and upheld defendant's contention,[6d] the Supreme Court summarily reversed, holding that the court of appeals could not entertain an interlocutory appeal. Courts of appeals have also declined to hear appeals by defendants contending that the prosecution was barred for lack of compliance with speedy trial requirements[6e] or for violation of an alleged agreement by the prosecutor not to prosecute.[6f]

6a. *See, e.g.*, United States v. Phillips, 699 F.2d 798 (6th Cir. 1983); United States v. Curcio, 694 F.2d 14 (2d Cir. 1982); United States v. Agosto, 675 F.2d 965 (8th Cir.), *cert. denied sub nom.* Gustafson v. United States, 459 U.S. 834 (1982); United States v. Hobson, 672 F.2d 825 (11th Cir.), *cert. denied*, 459 U.S. 906 (1982); United States v. Smith, 653 F.2d 126 (4th Cir. 1981); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975). *But see* United States v. Gregor, 657 F.2d 1109 (9th Cir. 1981), *cert. denied*, 461 U.S. — (1983); *cf.* United States v. Barron, 703 F.2d 270 (7th Cir. 1983) (attempted appeal from denial of defense motion to disqualify prosecutor). *See also* Annot., 5 A.L.R.4th 1251 (1981).

6b. — U.S. —, 104 S. Ct. 1051 (1984).

6c. 458 U.S. 263 (1982).

6d. United States v. Hollywood Motor Car Co., 646 F.2d 384 (9th Cir. 1981).

6e. United States v. Bilsky, 664 F.2d 613 (6th Cir. 1981).

6f. United States v. Bird, 709 F.2d 388 (5th Cir. 1983) *See also* Annot, 67 A.L.R. Fed. 925 (1984). For an argument favoring broader availability of interlocutory appeals, *see* Note, *Amending 28 U.S.C. §1292(b) to Permit Interlocutory Appeals in Federal Criminal Proceedings—An Economic Analysis*, 67 Iowa L. Rev. 1037 (1982).

Page 21·15. To the end of note 9, add the following new reference:

See also People v. Smith, 85 Mich. App. 32, 270 N.W.2d 697 (1978).

Page 21·15. To the end of note 9, add the following new reference:

The status of the law in the federal circuits is reviewed in United States v. Robertson, 698 F.2d 703, 706-707 (5th Cir. 1983).

Standard 21-1.4. Prosecution appeals

Page 21·18. To the end of note 2, add the following new material:

Section 3731 does not limit the jurisdiction of federal courts of appeals. When a federal case is prosecuted by state officials, on

removal from state court, prosecution appeal is governed by 28 U.S.C. §1291. *See* Arizona v. Manypenny, 451 U.S. 232 (1981).

Page 21·18. To the end of note 3, add the following new material:

An Arizona statute permits review on writ of certiorari if a trial court has exceeded its jurisdiction and there is neither appeal nor, in the judgment of the appellate court, any other plain, speedy, and adequate remedy. Ariz. Rev. Stat. Ann. §12-2001 (1956). Arizona courts have construed this provision to permit prosecution appeal in criminal cases to determine whether the lower court has exceeded its jurisdiction or committed an abuse of discretion. *See* State *ex rel.* Hyder v. Superior Ct., 624 P.2d 1264 (Ariz. 1981). In an unusual federal prosecution, removed to that forum from an Arizona court pursuant to 28 U.S.C. §1442(a)(1), the district court granted a post-trial defense motion to arrest judgment and to dismiss the indictment on the ground that Arizona law did not govern acts committed on federal lands. The Supreme Court held that this decision is appealable, under 28 U.S.C. §1291, because the decision would have been appealable in the Arizona state courts. Arizona v. Manypenny, 451 U.S. 232 (1981).

Page 21·19. To the end of note 5, add the following new material:

Government appeals from trial court decisions, made before jeopardy attaches under the fifth amendment or under similar provisions in state law, may not give rise to constitutional concerns, but the principle of limiting interlocutory appeals is also applicable. Thus, the prosecution should not be allowed to appeal from an order denying its motion for consolidation of trials. *See* Commonwealth v. Saunders, 483 Pa. 29, 394 A.2d 522 (1978).

Page 21·19. Insert a new note on line 10 from the top of the page:

. . . has been returned.[5a]

5a. *See* United States v. Helstocki, 442 U.S. 477 (1979); United States v. Layton, 720 F.2d 548 (9th Cir. 1983), *cert. denied,* — U.S. —, 104 S. Ct. 1423 (1984); State v. Hattersley, 294 Or. 592, 660 P.2d 674 (1983). The Connecticut Supreme Court held that the prosecution had no right to appeal a pretrial order denying jury trial. State v. Southard, 191 Conn. 506, 467 A.2d 920 (1983).

Pages 21·19 and 21·20. ***Replace the second and third paragraphs and notes 6, 7, and 9 with the following new material:***

The limitations of this standard do not conflict with the double jeopardy clause as construed by the Supreme Court of the United States in a series of recent cases,[6] but the standard is not intended to extend prosecution appeal to the fullest extent permitted by the Constitution. The Court has relaxed somewhat the constitutional constraints on prosecution appeal from rulings by trial judges that terminate cases before verdict in a jury trial or finding of guilt or innocence by the court in a nonjury trial. In *United States v. Scott,*[7] the Court upheld power of the prosecution to appeal from a trial court's decision at the close of all the evidence, dismissing several counts of an indictment because of the prejudicial effect of preindictment delay. Because this issue did not involve a determination related to factual guilt or innocence of the offense charged, the Court held that the double jeopardy clause did not preclude government appeal. To the extent that *United States v. Scott* allows appeal from some midtrial rulings, this standard does not approve of prosecution appeals in instances where such appeals would be constitutional.

6. United States v. Wilson, 420 U.S. 332 (1975); Serfass v. United States, 420 U.S. 377 (1975); United States v. Sanford, 429 U.S. 14 (1976); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); United States v. Ceccolini, 435 U.S. 268 (1978); Sanabria v. United States, 437 U.S. 54 (1978); United States v. Scott, 437 U.S. 82 (1978).

7. 437 U.S. 82 (1978). A decision by the trial judge that dismissed a prosecution, at the close of the government's case or after all the evidence, for want of sufficient evidence would not be appealable. Sanabria v. United States, 437 U.S. 54 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); *cf.* Fong Foo v. United States, 369 U.S. 141 (1962). *See also* Burks v. United States, 437 U.S. 1 (1978); Hudson v. Louisiana, 450 U.S. 60 (1981).

9. A number of appellate courts have held that it is constitutionally permissible to allow government appeal from postverdict judgments of acquittal on the ground that the evidence was insufficient to sustain a guilty verdict. *See, e.g.*, United States v. Steed, 646 F.2d 136 (4th Cir. 1981); United States v. Black, 644 F.2d 445 (5th Cir. 1981); Government of the Virgin Islands v. Josiah, 641 F.2d 1103 (3d Cir. 1981); United States v. Blasco, 581 F.2d 681 (7th Cir.), *cert. denied*, 439 U.S. 966 (1978); United States v. Dreitzler, 577 F.2d 539 (9th Cir. 1978), *cert. denied*, 440 U.S. 921 (1979); United States v. Steed, 674 F.2d 284 (4th Cir. 1982) (en banc); United States v. Singleton, 702 F.2d 1182 (D.C. Cir. 1983) (en banc). These courts construe the

federal statute on prosecution appeals to extend to the full limits permitted by the double jeopardy clause. They rely principally on United States v. Wilson, 420 U.S. 332 (1975). The *Wilson* case, however, involved appeal from an order granting a motion to dismiss an indictment on the ground of preindictment delay. The courts of appeals, ignoring the distinction between a judgment of acquittal and a dismissal of an indictment, are permitting appeal from trial court decisions directly related to factual guilt or innocence. *But see* United States v. Scott, 437 U.S. 82 (1978). The Supreme Court has not yet addressed the question of double jeopardy limitations on government appeals from postverdict judgments of acquittal. This standard does not approve such appeals.

Federal courts of appeals have refused to allow prosecution appeals from orders granting defendants new trials in the interest of justice. United States v. Sam Goody, Inc., 675 F.2d 18 (2d Cir. 1982); United States v. Dior, 671 F.2d 351 (9th Cir. 1982). *But see* United States v. Steed, 674 F.2d 284 (4th Cir. 1982) (en banc) (district court had granted judgment of acquittal and, conditionally, ordered a new trial; court of appeals reversed judgment of acquittal and, analogizing to appeals in civil cases, held that it could review order granting new trial and reversed that order as well).

For discussion of the right of the prosecution to appeal from the sentence, *see* standard 20-1.1.

Standard 21-2.1. The notice of appeal

Page 21·22. Replace note 5 with the following new note:

This standard applies to all convictions, including those based on accepted guilty pleas. A number of issues may be appealable even in a plea-based conviction, including review of the sentence imposed and of the procedures followed by the trial court when accepting the plea. *See* Borman, *The Hidden Right to Direct Appeal from a Federal Plea Conviction*, 64 CORNELL L. REV. 319 (1979). A trial court should advise the defendant of the right to appeal in all cases. A recent Pennsylvania case illustrates the appropriateness of appeal in the setting of a plea-based conviction; the sentencing judge erroneously used the maximum term for an offense similar to that charged against defendant but not included in the indictment. Commonwealth v. Hertzog, 492 Pa. 631, 425 A.2d 329 (1981). Federal judges are required to advise a defendant of the right to appeal only in contested cases. FED. R. CRIM. P. 32(a)(2). While this rule does not forbid a court from informing a defendant of the right to appeal, the rule is inconsistent with these standards.

Standard 21-2.2. Trial counsel's duties with regard to appeal

Page 21·24. To the end of note 1, add the following new material:

Trial counsel's duties with regard to appeal are not limited to contested cases. A defendant may have rights to be vindicated on appeal even though the conviction is based on a plea of guilty. *See* Commonwealth v. Allen, 278 Pa. Super. Ct. 501, 420 A.2d 653 (1980). *And see* standard 21-2.1, commentary, note 5. Sanctions may also be imposed on counsel who participate in an appeal for the purpose of delaying the completion of a criminal prosecution by seeking appellate review. *See* United States v. Blodgett, 709 F.2d 608 (9th Cir. 1983).

For cases assessing the quality of trial counsels' services regarding appeals, *see* Annot., 13 A.L.R.4th 533 (1982).

Standard 21-2.3. Unacceptable inducements and deterrents to taking appeals

Page 21·30. Insert a new note on line 4 of second full paragraph:

. . . heavier sentence.[6a]

6a. A related question arises in cases where appellants have been convicted on more than one count and sentenced to consecutive punishments. If conviction on one count is affirmed while conviction on a second count is reversed on a ground that precludes reprosecution, such as insufficiency of the evidence to sustain a verdict of guilty, the prosecution may seek to reopen the sentence on the conviction affirmed. In a recent case, the district court had imposed a five-year prison term for bank larceny (18 U.S.C. §2113(b)) and five years' probation for a false statements charge (18 U.S.C. §1014). Defendant appealed on both counts. The United States Court of Appeals for the Third Circuit reversed the conviction for bank larceny. The court of appeals then, sua sponte, directed that the case be remanded as to sentence so that the prosecution may apply to the district court for resentencing on the false statements count. United States v. Pinto, 646 F.2d 833 (3d Cir.); *cert. denied*, 454 U.S. 816 (1981).

Page 21·31. Insert a new note at the end of the carryover paragraph:

. . . trial court proceedings.[7a]

7a. *See* Papp v. Jago, 656 F.2d 221 (6th Cir. 1981).

Page 21·31. Insert a new note on the last line of the first full paragraph:

. . . should be avoided.[9]

9. *See* Commonwealth v. Allen, 378 Mass. 489, 392 N.E.2d 1027 (1979) (judge should be satisfied that the party seeking release pending appeal presents an issue that offers some reasonable possibility of being accepted by the appellate court).

Standard 21-2.5. Release pending appeal; stay of execution

Page 21·34. Delete paragraphs (a) and (b) of standard 21-2.5, and replace them with the following new material:

(a) When an appeal has been instituted by a convicted defendant after a sentence of imprisonment has been imposed, the question of the appellant's custody pending final decision on appeal should be reviewed and a fresh determination made by the trial court. The burden of seeking a stay of execution and release should be placed on the appellant. The decision of the trial court should be subject to redetermination by an appellate judge or court on the initiative of either the prosecution or the defense.

(b) Release should not be granted by the court unless the appellant establishes by clear and convincing evidence that release pending appeal will not create a substantial risk that appellant:

(i) will not appear to answer the judgment following conclusion of the appellate proceedings; or

(ii) is likely to commit a serious crime, intimidate witnesses or otherwise interfere with the administration of justice.

In deciding whether to release a convicted defendant pending appeal, the trial court should also take into account the nature of the crime and the length of sentence imposed, together with factors relevant to pretrial release.

Page 21·35. At the end of the paragraph under the heading **History of Standard,** *insert:*

Paragraphs (a) and (b) were amended by the House of Delegates on February 13, 1984. Paragraph (a) provides that the burden of

seeking a stay or release "should be placed on the appellant," a more positive formulation than the original version. Paragraph (b) declares that the burden is not met unless appellant presents clear and convincing evidence on the issues before the court. The earlier version did not specify a quantum of proof required.

***Page 21·35. Insert a new note on the last line of the second paragraph under the heading* Commentary:**

. . . foreclose appellate review.[a]

a. *See* Annot., 28 A.L.R.4th 227 (1984).

Page 21·36. Insert a new note on the last line of the third paragraph:

. . . accorded great respect.[a]

a. *See* Commonwealth v. Allen, 378 Mass. 489, 392 N.E.2d 1027 (1979).

Standard 21-3.2. Counsel on appeal

Page 21·41. To the end of note 4, add the following new material:

See also Commonwealth v. Hertzog, 492 Pa. 631, 425 A.2d 329 (1981). Since the last edition of these standards, a considerable body of case law has been developed on the application of the general requirement of effective assistance of counsel in the particular setting of appeals from convictions. *See* Annots., 13 A.L.R.4th 533 (1982), 15 A.L.R.4th 582 (1982).

Page 21·41. After the third paragraph, insert:

These standards declare that ordinarily a lawyer should not represent more than one defendant in a trial where several persons have been charged.[4a] Joint representation of criminal defendants may raise questions of constitutional law as well as questions of professional conduct. A comment to the ABA Model Rules of Professional Conduct cautions that "[t]he potential for conflict of interest in rep-

resenting multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant."[4b] The concerns for adequate representation of defendants at trial continue on appeal.[4c] When appeals are taken by several codefendants who have separate counsel, each attorney must be allowed to structure and present the appeal independently. An appellate court may appropriately calendar appeals in related cases so that they are considered at the same time and, where a court hears cases in panels, by the same set of appellate judges. However, a rule or practice authorizing the appellate court's administrative personnel to consolidate separate appeals into a single proceeding with the consequence that only one brief and one oral argument are permitted for all appellants is manifestly inconsistent with the principle that the attorney for each appellant be allowed to handle his or her client's case independently.[4d] Consolidation of appeals by order of an appellate court may be appropriate if action is taken after full consideration of the individual rights of each appellant.

4a. Standard 4-3.5(b).

4b. ABA Model of Rule of Professional Conduct 1.7, comment.

4c. The Council of the Criminal Justice Section recommended in 1981 that counsel, whether retained or appointed, preferably represent only one client in an appeal of a criminal case but that a client may agree to joint representation after informed consent to potential risks. Criminal Justice Section Council Report, Aug. 27, 1981.

4d. *Id. See* United States Court of Appeals for the Fourth Circuit, Local Rule 28 and Internal Operating Procedures 12.3, 28.2, and 34.3 (consolidation by court *sua sponte:* compulsory designation of lead counsel by attorneys or, failing agreement, designation of lead counsel by the clerk; joint brief and oral argument required).

Page 21·42. To the end of note 5, add the following new material:

The ABA Model Rules of Professional Conduct do not contain explicit reference to the decision to take an appeal in a criminal case. In the provision most analogous to EC7-7 of the Code of Professional Responsibility, the Model Rules refer to trial-level decisions regarding guilty plea, waiver of jury trial, and defendant's testimony. Rule 1.2(a).

Page 21·42. To the end of note 6, add the following new material:

The ABA Model Rules of Professional Conduct declare that a lawyer shall not bring or defend a proceeding, or assert or contro-

vert an issue therein, unless there is a basis for doing so that is not frivolous, which includes good faith argument for change of existing law. Rule 3.1. In the particular context of criminal proceedings, the MODEL RULES do not consider counsel's duties on appeal, but provide only that trial counsel may defend the proceedings so as to require that every element of the case be established. *Id.*

Page 21·42. To the end of note 8, add the following new material:

This course of action is also explicitly authorized by the ABA MODEL RULES OF PROFESSIONAL CONDUCT, with the admonition that counsel make the argument in good faith. *See* rule 3.1. An appeal taken solely to delay completion of a prosecution would not be in good faith. *See* United States v. Blodgett, 709 F.2d 608 (9th Cir. 1983) (possible monetary sanction against counsel).

Page 21·42. To the end of note 9, add the following new references:

See also People v. Wende, 25 Cal. 3d 436, 600 P.2d 1071, 156 Cal. Rptr. 839 (1979) (en banc); People v. Von Staich, 101 Cal. App. 3d 172, 161 Cal. Rptr. 448 (4th Dist. 1980); Commonwealth v. Moffett 383 Mass. 201, 418 N.E.2d 585 (1981); Mendelson, *Frivolous Criminal Appeals: The* Anders *Brief or the Idaho Rule?*, 19 CRIM. L. BULL. 22 (1983).

Page 21·42. After the third paragraph, insert:

In a recent postconviction proceeding involving allegedly ineffective assistance of counsel on appeal, *Jones v. Barnes*,[9a] the Supreme Court was faced with the contention that counsel on appeal is constitutionally required to present to the appellate court all nonfrivolous arguments requested by the appellant. Counsel appointed to represent an indigent in a state criminal proceeding had declined to press certain issues, which appellant then had raised on his own in a *pro se* brief. The Supreme Court declared that the accused has the ultimate authority to make the fundamental decision whether to take an appeal,[9b] but counsel may properly decide how to present the appeal in accord with counsel's professional evaluation. Chief Justice Burger's opinion for the Court stated that:

> There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts—often to as little as 15 minutes—and when page limits on briefs are widely imposed. . . . For judges [in postconviction proceedings] to second-guess reasonable professional judgments and impose an appointed counsel a duty to raise every "colorable" claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders*.[9c]

Justices Brennan and Marshall dissented.[9d] In their views, appellate counsel should be vigorous in advising the client on the strategy of the appeal, but the decision to accept or reject that advice should remain with the client.[9e] Justice Blackmun agreed that an attorney should argue all nonfrivolous claims upon which the client insists, but found that the source of the obligation is merely ethical, not a matter compelled by the constitutional guarantee of effective assistance of counsel.[9f]

9a. — U.S. —, S. Ct. 3308 (1983).
9b. — U.S. at —, 103 S. Ct. at 3312.
9c. — U.S. at —, 103 S. Ct. at 3313-3314.
9d. — U.S. at —, 103 S. Ct. at 3314.
9e. The opinion of Justice Brennan relies in part on this standard and the commentary. — U.S. at —, 103 S. Ct. at 3317.
9f. — U.S. at —, 103 S. Ct. at 3314. The opinion of Justice Blackmun cites this standard as the basis for counsel's ethical obligation.

Standard 21-3.4. Expediting handling of appeal

Page 21·50. At the end of the first full paragraph, add the following new footnote:

. . . comply with the schedule.[7a]

7a. *See* Annot., 27 A.L.R.4th 213 (1984).