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PROMINENT EMERSON INTERNATIONAL TRADE LAWYER JOINS PRACTICE GROUP

After a distinguished career at Emerson Electric Co., Carl Bauer has joined Armstrong Teasdale's Antitrust, Distribution & Franchise Practice Group as a partner in its St. Louis office. In his career at Emerson, Bauer was lead counsel for over fifty successful domestic and international acquisitions and was responsible for most international legal affairs for Emerson and its many operating divisions. In the international arena, Bauer created Emerson's International Trade Compliance Group and developed specific compliance programs and training on import and export controls, anti-boycott regulations, and Foreign Corrupt Practices Act and anti-corruption regulations worldwide. Bauer also handled domestic and international antitrust compliance and transactional reporting matters and internal investigations on a wide variety of topics.



Bauer formerly served Emerson as the Vice President, Associate General Counsel and Assistant Secretary.

His prior legal experiences also include law department work at Ralston and Eveready Battery, including the legal work for the St. Louis Blues Hockey Club during Ralston's ownership of the team. Bauer is a graduate of Washington University School of Law in St. Louis, which he attended following a distinguished career as a naval aviator, decorated for service in Vietnam.

"We are very excited to have an experienced antitrust counsel from a Fortune 100 Company join our antitrust practice" commented Glenn Davis, Chair of the Antitrust, Distribution and Franchise Group. "We have a very deep domestic and international trade regulation practice and Carl builds on that strength with not only special expertise but also the in-house perspective on trade compliance that only one with his experience can offer," Davis added. Bauer also brings extensive worldwide contacts with international lawyers in virtually every country and broad relationships in the general counsel community and among industry peers. Bauer will continue to work with Emerson on many projects in international trade and antitrust related disciplines and work with other Armstrong clients on antitrust transactional and compliance work.

ANTITRUST AND THE OBAMA ADMINISTRATION

The recent change in administration brings with it an expected ramp-up in antitrust enforcement over the course of the next four years. Even prior to the announcement of President Obama's full team of enforcement officials it is expected that merger enforcement will receive heightened attention, specifically in the areas of hospital and health care provider networks and corporate mergers that may affect innovation, create entry barriers or facilitate price collusion, particularly in high-tech industries.

On January 22, 2009 the Obama Administration nominated Christine Varney, a former FTC Commissioner, as Justice Department Antitrust Chief. Jon Leibowitz, a current FTC member, is considered the leading candidate to assume leadership of the FTC. Varney is experienced and aggressive and will doubtless take a tougher

approach in the civil arena than her Bush Administration predecessors. She is also likely to mend recent policy disagreements between the DOJ and FTC. The Senate Judiciary Committee holds its confirmation hearing on Varney on March 2, 2009.

Vertical marketing practices such as tying, resale price maintenance, and exclusivity, are also likely targets for more aggressive enforcement. In addition, from a heightened awareness of enforcement issues here at home, it is also expected that the Obama administration will look towards greater collaboration with international enforcement agencies, extending even further the reach of the global competition law network. With more than 100 countries now having adopted some form of competition law, this international cooperation is sure to be an expanding area of focus.



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This alert is offered as a service to clients and friends of Armstrong Teasdale LLP and is intended as an informal summary of certain recent legislation, cases, rulings and other developments. This alert does not constitute legal advice or a legal opinion and is not adequate substitute for the advice of counsel.

ANTITRUST TRADE TRENDS

AGENCY ACTIONS

The FTC charged two investment funds with failing to make timely Hart-Scott-Rodino filings for acquisitions of blocks of AutoZone, Inc. shares in 2004. ESL Partners L.P., and ZAM Holdings L.P. will pay civil penalties of \$525,000 and \$275,000 respectively. The maximum civil penalty is \$11,000 per day under the HSR Act. ESL negotiated payments of \$3,758 per day. – (12/15/08) www.ftc.gov/opa/2008/12/esl.shtm

CLIENT ALERT: HSR FINES

- Monitor expiration dates of HSR filings and size of existing holdings and additions that may trigger filing requirements.
- Rely on exemptions only after thorough analysis and monitor continued compliance.
- Bring potential violations to counsel promptly to aid mitigation of severe penalties.

The Antitrust Division issued new guidance on its leniency program in the form of FAQ's, accompanied by new model leniency letter templates. The leniency program allows cartel or conspiracy participants that fully cooperate with government investigations avoidance of prosecution or reduced penalties for antitrust crimes. – (11/19/08).

CLIENT ALERT: LENIENCY

- The leniency guidelines are tightened.
- If potential violations are detected consult with antitrust counsel promptly to consider options.

The FTC has issued proposed changes to its advertising guides regarding the use of endorsements and testimonials. The FTC proposal requires an affirmative disclosure of what results are typical if advertising typicality claims are made, rather than the currently recommended disclaimer indicating that "results are or may not be typical." While advisory in nature, the proposed change could have significant impact on franchisors, franchisees, and distributors who use customer testimonials. – (11/28/08) www.ftc.gov/os/february/2008/november/081128

CLIENT ALERT: ADVERTISING

- Review endorsement or testimonial advertising for compliance.
- Communicate changes in FTC policy to distributors, franchisees, or re-sellers.

IN THE COURTS

A federal judge granted final approval of settlements worth more than \$95 million in the massive price-fixing class action against

the largest domestic lumber manufacturers. The Court also granted an attorneys' fee award over \$37 million. The Court will supervise division of the fees among class counsel, due to conflicting demands among them. – (12/11/08. *In re USB Antitrust Litigation.*)

LG Display, Changwa Picture Tubes and Sharp Electronics are the latest to plead guilty in the Justice Department's long-running investigation into a global price-fixing conspiracy in the LCD computer and television screen industry. They will pay criminal fines of \$585 million, with LG hit for \$400 million, the second-largest antitrust fine ever. The investigation is continuing as to executives for the companies, and several foreign nationals have plead guilty and face incarceration in the United States. – (11/13/2008).

The Eighth Circuit recently denied a petition for immediate appeal of an order certifying a class of hospitals alleging that C.R. Bard, a manufacturer of urological catheters, monopolized the urological catheter market through exclusionary practices via restrictive contracts with group purchasing organizations and integrated delivery networks. – (12/9/08, *C. R. Bard Inc. v. Southeast Missouri Hosp.*, No. 08-8016 (8th Cir. 2008).

On December 30, 2008 the United States Court of Appeals for the Third Circuit vacated a district court's grant of class certification. *In re Hydrogen Peroxide Antitrust Litigation.* No. 07-1689 (MDL 1682). The Court held that each Rule 23 requirement for certification must be established by a preponderance of evidence, and courts must consider the merits of the underlying case to the extent the issues overlap with class certification issues, including consideration of expert testimony. The court reasoned that to reply on a "threshold showing... risks misapplying Rule 23" and there is no requirement that doubts be resolved in favor of class certification. In this regard, the court referred to the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007) which "cautioned that certain antitrust class actions may present prime opportunities for plaintiffs to exert pressure upon defendants to settle weak claims". The Twombly cite is noteworthy as that case related to the pleading standards applicable to conspiracy allegations in order to sustain a complaint.

CLIENT ALERT: LIT. RISK

- Antitrust class action risks remain high, particularly in the wake of criminal investigations.
- Federal Courts are increasingly receptive to ameliorating the burdens of class litigation when the claims are weak.
- Law360's 2009 Litigation Almanac's analysis of antitrust cases filed in Federal Courts between 2004 and 2008, shows a 58% increase over that period, 27% more cases in 2008 alone.

(cont. from 3)

INTERNATIONAL

The EU has issued guidance on its standards for analysis of abusive exclusionary conduct by dominant firms. Art. 82 of the EU Treaty prohibits dominant firms from engaging in exploitation of market power, for example by charging excessive or discriminatory prices (exploitative abuse) or adopting practices that raise entry business (exclusionary abuse). The Communication notes that companies with market shares below 40% are unlikely to have substantial market power or "dominance." For price based exploitative abuse that may result in anticompetitive foreclosure, the EU proposes to intervene only when the conduct has the capability of harming equally efficient competitors. For exclusionary abuses, the communiqué provides detail on EU intentions in evaluating common exclusionary abuses, including exclusive purchasing obligations, loyalty or conditional rebates, tying and bundling, predatory pricing, and refusal to deal. – (12/3/08).

CLIENT ALERT: EU GUIDES

- Remember that EU and other international antitrust authorities use different standards than U.S. Antitrust Agencies.
- Implement an effective Compliance Program that deals specifically with your international business.

The Canadian government is proposing significant changes to Canada's Competition Law and Investment Canada Act. The changes, if finally adopted, will align Canadian antitrust and foreign investment laws with their American counterparts. The measures lessen government burdens to prove a criminal conspiracy and heighten the fines and imprisonment penalties for violations. In the merger context, the government proposes a close approximation of the U.S. HSR process.

CLIENT ALERT: CANADA

- Risks of enforcement in Canada may increase.
- Penalties for violations may increase.
- Alignment with U.S. principles may lead to more consistency.
- Acquisition of Canadian assets that may affect national security are strengthened.

FRANCHISE AND DISTRIBUTION TRENDS IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The Missouri Court of Appeals for the Western District recently ruled that the implied covenant of good faith and fair dealing is not a valid defense when an at-will distributorship agreement has been terminated. See *Newco Atlas, Inc. v. Park Range Const., Inc.*, ___ S.W.3d___, No. WD69247, 2008 WL 5212205 (Dec. 16, 2008, Mo. App. W.D.). An at-will distributorship agreement is one without a specified term and can be terminated by either party without cause. Although the implied covenant of good faith and fair dealing is implied by Missouri law in every contract, the Court concluded that the implied covenant will not apply in at-will distributorship agreements because the remedy of recoupment provides the exclusive remedy.

Missouri courts apply the recoupment doctrine for the protection of dealers. The recoupment doctrine imputes duration of time to a terminable at-will dealership agreement that is equal to the length of time that is reasonably necessary for a dealer to recoup its investment in the dealership. See *Ernst v. Ford Motor Co.*, 815 S.W.2d 910, 918 (Mo. App. W.D. 1991).

The Missouri Court of Appeals in *Newco Atlas, Inc.* analogized a terminable at-will distributorship agreement with

the employment relationship of an at-will employee. *Newco Atlas, Inc.*, 2008 WL 5212205 at *6. The Court concluded that an implied covenant of good faith and fair dealing cannot exist in an at-will employment relationship because the public policy supporting an at-will employment relation is to allow either party to terminate the relationship without cause. An employee, however, can rely on the legal theory of wrongful termination for protection. *Id.* The Court analogized the wrongful termination legal theory with the recoupment doctrine and ruled that recoupment, like wrongful termination, is the legal protection provided to dealers in a terminable at-will distributorship agreement, not the implied covenant of good faith and fair dealing. *Id.*

This case is significant for manufacturers in Missouri or whose distributorship agreements are governed by Missouri law. A Missouri court has conclusively ruled that the implied covenant of good faith and fair dealing, often the cornerstone of any franchisee or dealer's defenses or counterclaims, is not valid when a distributorship agreement may be terminated by either party and does not have a specified term. Within that context, the dealer's exclusive remedy is the doctrine of recoupment, which, depending on how long the dealer has been engaged in the relationship, may be negligible or non-existent.

NEW HSR PRE-MERGER FILING THRESHOLDS

The Federal Trade Commission (“FTC”), recently announced revised thresholds for pre-merger filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (“HSR Act”) effective February 12, 2009.

The reporting requirements under the HSR Act serve as an opportunity for the FTC and the Department of Justice-Antitrust Division (“DOJ”) to determine whether a proposed acquisition or formation of a joint venture could create an antitrust violation or concern. Generally, both the acquiring person and the acquired person file the reporting form and the proposed transaction may not be consummated until the expiration of a 30-day waiting period, unless the waiting period is terminated early by the FTC, additional information is requested by the FTC or DOJ thereby extending the waiting period, or the FTC or DOJ raises a concern and requires a restructuring of the transaction or imposes some condition or restriction on the transaction. Importantly, the FTC and DOJ are not necessarily prohibited from later raising an antitrust challenge merely because no concern has been raised, the waiting period has expired and the transaction has been consummated.

The HSR Act provides that transactions valued at an excess of \$200 million (as adjusted) are reportable regardless of the size of the parties. Transactions valued in excess of \$50 million (as adjusted) are reportable only if the acquiring and acquired persons meet the “size-of-person” test – either the acquiring or acquired person must have annual net sales or total assets exceeding \$100 million (as adjusted) and the other party must have annual net sales or total assets exceeding \$10 million (as adjusted). Acquired persons not engaged in manufacturing relying on the \$10 million (as adjusted) test must meet it on the basis of assets alone.

The fact of filing and the information provided in or with the filing are generally confidential and not subject to the Freedom of Information Act. The information can be disclosed in connection with congressional proceedings or as relevant in any administrative or judicial proceeding. If early termination of the 30-day waiting period is requested and granted, however, the termination of the waiting period is announced on the FTC’s website (<http://www.ftc.gov/bc/earlyterm/index.html>).

There are substantial penalties for failure to file a required pre-merger notification. The FTC also recently announced an increase in the daily maximum penalty from \$11,000 to \$16,000 per day on any person or officer, director or partner for failure to comply. In recent years the U.S. Antitrust Agencies have vigorously pursued HSR Act violations by acquiring persons, including investment firms. This is the first change in this penalty since 2000.

The HSR Act notification thresholds are adjusted annually to reflect changes in the U.S. gross national product. They will remain in effect until the next annual adjustment, expected in the first quarter of 2010. The new thresholds will become effective 30 days after publication:

HSR ACT OR RULE PROVISION	INDEXED VALUE
\$50 million size-of-transaction test.....	\$65.2 million
\$200 million size-of-transaction test.....	\$260.7 million
\$100 million size-of-person test.....	\$130.3 million
\$10 million size-of-person test.....	\$13.0 million
\$50 million notification threshold.....	\$65.2 million
\$100 million notification threshold.....	\$130.3 million
\$500 million notification threshold.....	\$651.7 million
\$255 of voting securities valued at \$1 billion notification threshold.....	\$1,303.4 million

Note that certain exemptions may apply depending on the nature of the transaction and the nature and location of the assets and entities involved. Consequently, additional analysis is often required before making a final determination regarding the need for a filing.

The thresholds do not affect the HSR Act filing fees, but the applicable filing fee will be based on the new thresholds, as follows: \$45,000 for transactions valued at greater than \$65 million but less than \$130.3 million; \$125,000 for transactions valued from \$130.3 million up to \$651.7 million; and \$280,000 for transactions valued at \$651.7 million or more.

The FTC also authorized revised thresholds for Section 8 interlocking directorates under Section 8 of the Clayton Act, as amended. The amendment establishes jurisdictional thresholds that trigger the Act’s prohibition on interlocking directorates. The new thresholds are \$26.16 million for Section 8(a)(1) and \$2,616,000 for Section 8(a)(2)(A).

Section 8 of the Clayton Act generally prohibits a person from serving simultaneously as a director or officer of competing corporations engaged in commerce if each competing corporation has capital, surplus, and undivided profits aggregating more than \$10 million (as adjusted).

The interlocking directorate prohibition does not apply if either corporation’s “competitive sales” – gross revenues for all products and services sold by one corporation in competition with the other – are less than \$1 million (as adjusted). As with the HSR threshold, the FTC must annually revise the interlocking directorate thresholds based on the change in the gross national product.

Copies of the FTC’s release on these adjustments are available at <http://www.ftc.gov> or by toll free telephone: (877)-FTC-HELP.

If you have any questions about pre-merger notification requirements and application of them to your business, or any other antitrust planning, compliance, or litigation issues, we would welcome the opportunity to discuss these issues with you in more detail.

ABOUT ARMSTRONG TEASDALE

Armstrong Teasdale is a leading national law firm that delivers sophisticated legal advice and exceptional client service. With nearly 300 attorneys practicing in eleven strategic office locations, we serve a dynamic national and international client base in virtually every area of law. Whether an issue is local or multi-jurisdictional, practice area specific or industry related, Armstrong Teasdale provides each client with an invaluable combination of legal and practical advice capable of securing optimal results. For more information, please visit www.armstrongteasdale.com.

ABOUT THE PRACTICE GROUP

The attorneys in our Antitrust, Distribution and Franchise Practice Group are experienced in dealing with a broad spectrum of complex antitrust issues as well as a wide variety of issues in distribution and franchise law. Group attorneys are skilled in performing antitrust audit and compliance counseling matters, business planning and regulatory guidance, responding to merger investigations, as well as prosecuting and defending civil and criminal antitrust claims. Our focus is to assure compliance without sacrificing proper business objectives, while minimizing risk and avoiding unnecessary litigation. Our attorneys provide representation for many national franchising business leaders and have also developed a strong background in international franchising matters. We understand the franchise and distribution business – whether our client is a large franchisor with thousands of outlets or an entrepreneur in the start-up stage.