



ARMSTRONG TEASDALE LLP

LITIGATION

PROUD PAST...
EXCITING FUTURE.

FIRM NEWS

A Demonstrable Record of Outstanding Verdicts Awarded in the State of Missouri

Over the last eight years, Armstrong Teasdale has produced 24 verdicts in the annual Top 15 plaintiff or defense verdicts in the State of Missouri. Recently, the firm claimed three of the lists' Top 11 spots for 2005. The first at #5 (\$5 million), followed by #7 (\$4 million) and #11 (1.5 million). In 2003, the firm received the second largest defendant's verdict, and two of the Top 11 verdicts. In 2002, the firm received the #1 defense verdict, three of the Top 14 defense verdicts and the 5th largest plaintiffs' settlement. In 2001, the firm received four of the Top 20 defense verdicts and the 13th largest plaintiff's verdict. In 2000, when products, auto and medical malpractice cases dominated the top plaintiff's verdicts, three of our defense verdicts made the state's Top 10 list. In 1999, our defense of a \$5,000,000 lawsuit was the #1 defense verdict, while a \$5.2 million award for another client was the #6 plaintiff's verdict; and in 1998, three of our defense cases, totaling \$5,750,000 in savings for our clients, made the Top 10 in the state. We are proud of these outstanding results and truly appreciate the trust our clients place in us to handle these substantial litigation matters.

Antitrust, Distribution & Franchise

Putting the "Trust" Back in Antitrust

Singing A New Tune: *Three Tenors* Decision Increases Uncertainty for Joint Ventures

A significant legal issue facing prospective joint venture partners, who otherwise compete in the marketplace, is whether their collaboration may violate antitrust laws. In the fall of 2005, the United States Court of Appeal for the D.C. Circuit issued its ruling in *PolyGram Holdings, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005) (the "*Three Tenors*"), addressing this very issue. What is

(continued on page 2)

In This Issue

Putting the "Trust" Back in Antitrust	1
Asbestos	3
<i>Greg Iken</i>	
Class Action Fairness Act Burden Shifting Question Nearly Settled	3
<i>Chad Colgan</i>	
Criminal Defense and Compliance	4
<i>Thomas Bradshaw</i>	
Outstanding Trial Results	6

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(continued from page 1)

noteworthy about the *Three Tenors* is its condemnation of the joint venture as violating Section 1 of the *Sherman Act* without any inquiry into the pro-competitive aspects of the venture. The court's treatment of this issue requires careful consideration before entering into joint venture agreements where the partners to that venture are competitors.

The *Three Tenors* case involved an agreement to distribute audio and video recordings of the 1998 Three Tenors concert. PolyGram distributed the recordings from the first Three Tenors concert in 1990, and Warner distributed the recordings from the second concert in 1998. PolyGram and Warner, however, were reluctant to undertake the 1998 concert on independent basis, so they eventually reached an agreement to collaborate on the project. Both companies had concerns that the release of the 1998 album would not be successful if either company's previous recordings were allowed to benefit from the 1998 promotional and marketing activities. Accordingly, they agreed to suspend marketing and discounting activities for their independent recordings during a 10-week period coinciding with the 1998 launch.

The Federal Trade Commission ("FTC") challenged the moratorium agreement under Section 5 of the *FTC Act* (which grants the FTC the power to prevent unfair methods of competition). Although Warner settled the claim against it, PolyGram disputed the FTC's allegations. After a trial before an FTC Administrative Law Judge, the moratorium was found to be illegal because it was not reasonably ancillary to the joint venture and, thus, was a naked-price fixing agreement and a *per se* violation of the *Sherman Act*.

After the FTC affirmed the ruling, PolyGram petitioned for review in the D.C. Circuit. PolyGram argued that the moratorium was reasonably related to the joint venture and had the pro-competitive benefit of fostering cooperation while preventing opportunistic free riding by either partner. Under a traditional rule of reason analysis, such an argument might have been sufficient.



However, the Court rejected the traditional bright line distinction between a *per se* analysis (applied to price fixing and other arrangements that are illegal on their face) and the rule of reason

(balancing potential injury with pro-competitive explanations). The Court applied an intermediate analysis, where a restraint that likely impairs competition based on experience of the market is presumed unlawful and, to avoid liability, the defendant must identify a competitive benefit that offsets the anticipated harm. Finding that the Warner-PolyGram moratorium was dangerously close to a naked price fixing agreement between competitors, the D.C. Circuit rejected PolyGram's arguments and upheld the FTC's ruling.

Although it remains to be seen what the impact of the *Three Tenors* decision will be and whether it may be limited to its facts, the analysis applied by both the FTC and the D.C. Circuit must be considered before competitors enter into a joint venture. Where the parties will continue to compete with one another and with the joint venture, care must be taken to avoid any agreements that limit that competition, particularly ones that border on traditional *per se* violations of the antitrust laws. If the potential of competition between a member of the joint venture and the joint venture itself poses a risk to the success of the venture, the parties should consider whether the venture can be expanded to include the otherwise competitive activities of the parties. If it meets with the parties' objectives, the safest course appears to be a complete consolidation of their efforts into the joint venture, thereby removing any competitive issues by the individual members. Regardless, the *Three Tenors* analytical framework introduces new uncertainties that must be dealt with by competitors who want to enter into a joint venture.

Asbestos



Raymond Fournie and Anita Kidd recently represented a major brake manufacturer and consistent “target” of asbestos litigation plaintiffs in an asbestos lawsuit in Madison County, Illinois against the widow of a

former gasser/greaser at a trucking company. The widow was represented by the SimmonsCooper law firm. After a week of trial and the filing, on behalf of the client, of a Motion for Supervisory Order with the Supreme Court of Illinois challenging an exception to the Lipke rule (which does not allow defendants to provide evidence of exposure to parties who are not a part of the trial) they succeeded in enabling the client to obtain a favorable resolution in this and a number of other cases.

Most of the asbestos litigation that Armstrong Teasdale handles takes place in Madison County, IL, where the climate has begun to soften with respect to defendants.

While there has not been tort reform *per se*, there have been favorable Illinois Supreme Court rulings that appear to have assisted in this change. An example of the altering climate began in the first part of 2005 where, out of the five asbestos trials that went to verdict, four were defense verdicts and one was a small enough plaintiff’s verdict that the defendant did not have to pay any money due to settlement set offs.

The Asbestos Practice Group continues to handle cases all over Missouri and Illinois. Ray Fournie was recently asked by one of our clients to be a part of an initial three person national trial strategy team for asbestos litigation. So far in 2006, our clients have been dismissed from over 500 asbestos cases without suffering financial liability. With over 1,300 cases still pending, the Asbestos Practice Group is looking to continue, and expand upon, this record of success on behalf of our clients.

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Class Action

Class Action Fairness Act Burden Shifting Question Nearly Settled

Since the passage of the *Class Action Fairness Act of 2005*, Pub. L. 109-2, 119 Stat. 4 (“CAFA”) in February 2005, a significant body of case law has developed interpreting the new and complex changes to class action jurisdiction and procedure in federal courts as a result of the law. One previously unsettled question involves whether CAFA shifts the burden of proof on a motion to remand a case back to state court to the party opposing federal jurisdiction. CAFA says nothing about the jurisdictional burden of proof when an action is removed to federal court and the traditional rule is that the removing party bears the burden of establishing federal jurisdiction.

Initially, a number of courts, not relying on any provision in CAFA but its legislative history, took the position that the burden shifts to the plaintiff moving for remand of a class action removed under CAFA to show that federal subject matter jurisdiction is lacking.

The rationale for this change was a senate judiciary report issued ten days after CAFA’s passage into law which states: “If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied).” S.Rep. No. 109-14, at 42 (Feb. 28, 2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 40.

At the same time, a split was developing in the case law with a number of courts holding that Congress’ silence meant that CAFA did not change the burden of proving federal jurisdiction when a motion to remand is filed.

The Seventh Circuit was the first appellate court to weigh in on the burden of proof issue, and the court held that CAFA did not alter the traditional burden on a motion to remand. “The rule that the proponent of federal jurisdiction bears the risk of non-persuasion has been

(continued on page 4)



(continued from page 3)

around for a long time. To change such a rule, Congress must enact a statute with the President's signature (or by a two-thirds majority to override a veto). A declaration by 13 Senators will not serve." *Brill v.*

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Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005).

Recently the Ninth Circuit followed the Seventh Circuit and also held that CAFA did not alter the burden on remand.

"We join our sister

circuit and hold that CAFA's silence, coupled with a sentence in a legislative committee report untethered to any statutory language, does not alter the long-standing

rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction." *Abrego v. Dow Chemical Co.*, — F.3d —, 2006 WL 864300, *8 (9th Cir. April 4, 2006).

With two circuits now having decided the issue by following the traditional rule on the burden for federal jurisdiction, a defendant will have a more difficult time arguing that CAFA shifts the burden to the party opposing remand. A majority of the circuits have not weighed in on the burden issue and a circuit split is a possibility, although with the direction of the recent case law it is unlikely future decisions will shift the burden of proof on a motion to remand.

Chad Colgan

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Criminal Defense and Compliance

We recently received notice that after 6 long years of litigation, the Veterans Administration awarded our client, Moses Cruse, a WWII Combat Veteran, a permanent disability rating entitling him to VA disability payments which will provide to him and his wife much needed financial security in their old age. Cruse's story is both heartwarming and also a sad commentary on the inefficient bureaucracy that is our Veterans Administration.

Cruse was the youngest boy in a large African American family, born on a small share cropper farm near Savannah, Georgia in 1925. His mother took him to the nearest Army post and enlisted him at the age of 16 because there was no work for him at home. It was November, 1941 just one month before the attack at Pearl Harbor thrust the U.S. into WWII. In the early days of the War, black soldiers were assigned to menial jobs in non-combat units because they were still viewed as inferior to white soldiers, could not be counted on in battle. Cruse wound up with a road building construction unit laying down a highway across Canada to better move war material. While working on the Canadian highway, a dump truck backed over his left leg almost severing it and hospitalizing him for eleven days in Waterways, Canada. His left leg and hip were never the same and pained him

throughout his next four years of military service and later life, leading eventually to a total hip replacement.

By the time Cruse was released from the hospital and went back to road building, the U.S. Army's body count in the war had mounted causing the U.S. Military Command to rethink its policy and decide that African American servicemen now could be assigned to combat units. As it turned out, the all-black units fought bravely, albeit under white officers. Many of their members were decorated with the nation's highest awards for distinguished service and bravery.

In 1944, Cruse shipped off with his all-black Georgia unit to England and a pre-invasion staging area, eventually assigned as a driver in the 614 Tank Destroyer Battalion. They were put in the hold of the troop ship so that white soldiers could have the better accommodations in the decks above.

Cruse's unit landed in France shortly after the D-Day Invasion, where his unit suffered severe casualties and fought across France and Germany until VE Day. The 614th Tank Destroyer Battalion earned eight Silver Stars, 28 Bronze Stars, and 79 Purple Hearts. The unit also

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(continued from page 4)

received the Presidential Unit Citation and had a recipient of the Medal of Honor. By the end of WWII, more than 700,000 African Americans served in the Army, 170,000 served in the Navy and Coastguard and 16,000 served in the Marines.

During his service with the 614th Tank Destroyer Battalion, Cruse earned 5 battle stars. On VE Day, Cruse was in LaMar, France with his unit still in the field.



Returning to the United States in 1945, Cruse settled in the Kansas City area and trained as an automobile mechanic. He and his wife, Fannie, his childhood friend, raised three boys and three girls. The problems with his left leg limited Cruse's ability to hold certain jobs requiring him to be on his feet for long periods or

climb steps or ladders. After reaching retirement age, Mr. and Mrs. Cruse had to sell their home in Edwardsville, Kansas to live off of the small equity and their social security payments.

Armstrong Teasdale has been representing Cruse in litigation with the VA for 6 years trying to obtain a disability rating for him. Although we had Cruse's discharge papers and combat medals, the VA claimed that all of his other service records had been destroyed in a fire at the Army Records Center in St. Louis in 1973.

Our work included driving Cruse to the VA Regional Office in Wichita, Kansas and presenting him for his deposition; arranging for an orthopedic examination and several reports by Dr. Michael Huo, who at that time was Head of the Orthopedic Surgery Unit at KU Medical Center; conducting our own search of the daily activity log for Cruse's unit to prove his injury and hospitalization in Canada; and obtaining affidavits from family members regarding Cruse's leg and hip problems.

The VA denied Cruse's claim on the grounds that he could not prove that his leg and hip were injured in an accident in 1942 and we appealed. The Canadian hospital where Cruse had been treated had changed ownership several times. All the hospital records from that time were lost. Special thanks go to our then summer clerk, Elizabeth Wilhelmi, who worked several hours at the Army Records Center in St. Louis and finally located the records for Cruse's unit and his personal service records to prove the injury and hospitalization in 1942. It took Elizabeth an entire day of searching before she came across the daily activity log that showed Cruse being injured in the truck accident and being hospitalized for 11 days. (Records the VA told us had been destroyed.) Prior to the discovery of these records, we only had Cruse's word to prove the injury because virtually all of the men in his unit, who would have been witnesses to his injury, were deceased. The few who may have survived could not be located. Matt Burgess deserves particular credit for his tireless efforts on Mr. Cruse's behalf. Matt worked with Steve Goodman, a member of U.S. Congressman's Dennis Moore's staff who is in charge of Veterans Affairs, and is a Vietnam Veteran intimately familiar with the torturous process for advancing a VA disability claim.

As a result of these combined efforts and after this long struggle with the Veterans Administration, the financial future of Mr. and Mrs. Cruse is secure – and deservedly so. Cruse received a 70% disability rating which we intend to use as a springboard to a 100% rating. The 70% disability rating entitles him to \$95,000 lump sum for disability payments owed back to the filing of his claim. In addition, he and his wife will receive \$1,200 per month going forward, an amount we may be able to increase to \$2,000.

Thomas Bradshaw

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OUTSTANDING TRIAL RESULTS

HEALTH CARE LITIGATION

Kristin Byrd and **Anna Selby** were instrumental in getting a wrongful death case dismissed against our client, a defendant hospital. The Plaintiffs brought a wrongful death action against the hospital and a physician alleging that their mother, a previously healthy 68 year old, died of complications from a kidney biopsy. The allegations centered around the hospital's failure to properly monitor the patient to identify a kidney bleed, and the physician's failure to take appropriate actions to stop the bleed once it was identified. After the bleeding was discovered, an embolization procedure was performed to stop the bleeding. Complications arose during the embolization procedure, and decedent suffered a cardiac arrest. She suffered severe neurological damage and was placed on life support, which the family eventually had to discontinue.

The Plaintiffs sued the hospital based on the treatment provided by nurses, interns and residents involved in the case. The case had been pending since 2003, with a large number of depositions taken; the case is set for trial in June. The Plaintiffs' expert witness offered some criticisms of the residents involved in the patient's care, but in part of his testimony stated that it was "iffy" whether or not our resident physician should have acted in the way he suggested. We filed a Motion for Summary Judgment based on the lack of reasonable medical certainty set forth by the plaintiffs' expert in that testimony of an "iffy" standard of care violation did not support a submissible case of medical malpractice against the hospital. The Plaintiffs could not formulate a sufficient response to our Motion for Summary Judgment, so they agreed to dismiss the hospital, with prejudice, in exchange for our client's agreement not to pursue taxable costs. The case will go forward against the co-defendant in June.

TORT AND COMPLEX TRIAL

Senior Judge Byron Kinder recently ruled in favor of Armstrong Teasdale's clients DNR and Doyle Childers (and also in favor of Union Pacific) and against Attorney General Nixon on the Booneville Bridge litigation. Judge Kinder granted our Motion for Summary Judgment and denied the AG's motion. This successful outcome was led by **Kent Lowry** and is largely due the efforts of **Scott Jansen** who worked long and hard and produced excellent briefs and motion papers. **Jennifer Buchowsky** and **Matt Turner** also made significant contributions to the outcome.

INTELLECTUAL PROPERTY

Andy Mayfield and **Jeffrey Kass** achieved a major victory for Armstrong Teasdale client Fuse Advertising, Inc. Following an evidentiary hearing and argument last November, Judge Henry Autrey of the U.S. District Court for the Eastern District of Missouri entered an order on February 15, 2006 denying Fuse, LLC's motion for preliminary injunction. (This result is a reprint from the February issue, the client was listed incorrectly.)

PROFESSIONAL DEVELOPMENT

Casey Housely spoke to the Boating Industry Risk Management Council on NFPA 921 Marine Fire Investigation Chapter in Miami, FL on Feb. 17.

The Missouri Bar Journal has published "Non-Compete Agreements and Unfair Competition - An Updated Overview," an article authored by **Bill Corrigan** and **Michael Kass**, in the March/April issue. The article can be found on the firm's Web site home page.

Jim Martin was a guest speaker to a group of Commerce Bank customers on February 22 on "Understanding the Prosecutors Perspective."

Tim Gearin and **Kristin Byrd** made a presentation at Ascension Health's Annual Risk Conference in Baltimore, MD on April 26. The audience included Ascension's claims and risk managers from around the country. The presentation focused on issues relating to vicarious liability of hospitals for their non-employed physicians including topics on agency, credentialing, and avoiding liability for non-employed physicians.

In the 2008 edition of the "National Fire Protection Association 921 - A Guide for Fire and Explosion Investigation" a new chapter will be added entitled "Marine Fire Investigation." Armstrong Teasdale's **Casey Housley** is a member of the task group drafting the new chapter and is the only lawyer on the task force. Casey specializes in marine manufacturer product liability. If you would like more information about NFPA 921 or the new Marine Fire Investigation Chapter contact Casey at 800-243-5070 x5224.

In the 2008 edition of the "National Fire Protection Association 921 - A Guide for Fire and Explosion Investigation" a chapter entitled "The Management of Major Investigations" will be revised. Armstrong Teasdale's **Karrie Clinkinbeard** and **Jerry King** are members of the task group revising the chapter. Karrie and Jerry are both Certified Fire and Explosion Investigators, instructors at the National Fire Academy and at the National Association of Fire Investigators' National Seminar on Fire Analysis Litigation. If you would like more information about NFPA 921 or "The Management of Major Investigations" chapter, contact either Karrie (x5210) or Jerry (x5217) at 800-243-5070.

PROFESSIONAL DEVELOPMENT

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Karrie Clinkinbeard and **Jo Leigh Wagoner** presented at the Kansas City Arson Task Force's Annual Seminar in April. This was Jo Leigh's fourth year presenting at this seminar. The three-hour presentation covered Daubert issues, the Magnetek case and general legal issues in fire related civil litigation.

Karrie Clinkinbeard, Jo Leigh Wagoner and **Gerald King** recently presented the Legal Module of the "Interviewing-Interrogation Techniques and Courtroom Testimony Course" at the National Fire Academy (NFA) in Emmitsburg, MD. The NFA is located at the Department of Homeland Security's National Emergency Training Center. The Legal Module prepares the students to testify as expert witnesses in fire and explosion cases. Karrie, Jo Leigh and Jerry conducted the lectures as well as the direct and cross-examination of every student in the course. For more information on the Department of Homeland Security's National Fire Academy or the Interviewing-Interrogation Techniques and Courtroom Testimony Course (Course Code R208), visit the NFA's website at www.usfa.fema.gov/training/nfa.

Jeffrey Kass, the Co-Editor of *DRI's Business Suit* Intellectual Property Column, was mentioned in the March issue and also had an article published, "Remote Solution. Creating a Problem for Contributing Patent Infringement?" included in the same issue.

On April 24, **Thomas Bradshaw, Jim Martin, John Sullivan**, and **Scott Golde** presented a day long seminar in Kansas City to the Kansas City Chapter of the Association of Certified Fraud Examiners at their annual meeting. The topic covered was "Money Laundering: Criminal Prosecution, Regulations and Compliance". Patrick Kenny was very instrumental in Armstrong Teasdale being selected for the program.

Kent Lowry participated as a faculty member in the Missouri Organization of Defense Lawyers-John Oliver, Jr. Trial Academy on March 27-31.

Tom Bradshaw spoke on the topic of "The Admissibility of Statements in Criminal and Civil Settlement Negotiations" at the Federal Criminal Practice Institute Sentencing Guidelines Update, New Federal Rules of Evidence and Ethical issues on April 21. The seminar was held at the *Lantz Welch Education Center, KCMBBA Headquarters*.

Rich Ralston will be delivering a series of speeches in June for the University of Missouri-Kansas City on arbitration and other alternative dispute resolution processes.

Russ Riggan will be speaking on June 2 on Employment Law at the Missouri Bar's Annual Law Update in Sikeston, Missouri.

A team of Armstrong Teasdale attorneys made up of **Karen Baudendistel, Ty Ketchum, Kent Lowry, Matt Reh, Mark Sophir, Jim Stockberger** and **Larry Tucker** from the Litigation Department made presentations to employees of Cottingham & Butler at its Trucking Risk Control Workshops in St. Louis on April 21. A similar presentation will be made in Dubuque, Iowa on May 11-12. Research and preparation for the project was done by **Carlton Callenbach, Sara Finan, Terri Lynch** and **Todd Nissenholtz**. Cottingham & Butler is a client of the firm and managed by Rick Engel.

Gentry Sayad and **Jennifer Schwesig** will be making a presentation on the Foreign Corrupt Practices Act for employees and officers of Gates Rubber/Tomkins Industries affiliates in China on May 9.

Tom Weaver is scheduled to speak at the "Eminent Domain: Legal Update" seminar in Clayton on June 15.

This Litigation Practice Group Update is a summary for general information and discussion only. It should not be construed to be a complete analysis of the matters presented and may not be relied upon as legal advice.

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